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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD of EDUCATION,
CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, *et al.*,
Appellants,

v.

EWALD B. NYQUIST,
Commissioner of Education, *et al.*,
Appellees.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT OF THE CITY APPELLANTS

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QUESTIONS PRESENTED

Appellants are the school boards and students from Rochester, New York City, Syracuse and Buffalo, the largest school systems in New York State. Despite the cities' most restricted fiscal base for supporting schools and their greatest concentrations of students with special needs, the State's formula for aiding school districts considers appellants "wealthy"; accordingly, the statute apportions to them only reduced and below average aid for each pupil and reduced and inferior supplemental aid for each disadvantaged and handicapped pupil, resulting for many thousands of city students in the denial of resources required to achieve basic minimal educational skills. The Court of Appeals' "rational basis" disposition upholding the statute presents the following questions:

1. Is there a rational basis, meeting Fourteenth Amendment requirements, to justify inferior State education support for big city school districts in New York which suffer extraordinary fiscal pressures that reduce local school funds and which must also bear the extra costs of schooling vast numbers of educationally disadvantaged children?

2. Does a more exacting equal protection standard than the rational basis test apply under the Fourteenth Amendment to invalidate inferior support by the State education aid law to big city school districts, whose diminished school resources deny many thousands of disadvantaged pupils the opportunity to achieve even basic minimal educational skills?

3. Does a more exacting equal protection standard than the rational basis test apply under the Fourteenth Amendment to invalidate inferior support by the State education aid law to big city school districts, which causes schooling deprivation for the vast majority of the State's children from racial minorities and from poverty circumstances?

4. Did the Court of Appeals err in deeming *Rodriguez* (411 U.S. 1) dispositive of the federal equal protection challenge to a State aid law which provides inferior support for city school systems suffering the most restricted school funding capacity; enrolling the great majority of the State's blacks, Hispanic and poor children; and burdened by the greatest concentrations of pupils with special needs, many of whom are denied even the opportunity to acquire basic minimal skills? *

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* In addition to the school boards of Rochester, New York City, Syracuse and Buffalo, the following parties appeared below as plaintiffs: Abraham D. Beame, as Mayor of the City of New York; Lee Alexander, as Mayor of the City of Syracuse; Melvin Lechner, as Director of the Bureau of the Budget of the City of New York; Rosemary Brennan; John M. Franco, as Superintendent of Schools and Elizabeth Farley, as President of the Board of Education of the Rochester City School District; Irving Anker, as Chancellor, and James F. Regan, as President of the Board of Education of the New York City School District; Joseph Manch, as Superintendent of Schools, and Joseph E. Murphy, as President of the Board of Education of the Buffalo City School District; Edwin E. Weeks, Jr., as Superintendent of Schools, and Douglas H. Lyon, as President of the Board of Education of the Syracuse City School District; United Parents Associations of New York, Inc.; Christopher and Steven Fish, infants, by William E. Fish, their parent and natural guardian; Jose A. Rivera, an infant, by Ramon Rivera, his parent and natural guardian; Mark and Sonji Simkin, infants, by Nance Simkin, their parent and natural guardian; Tressy, Tina and Harold Dodds, infants, by Annie Dodds, their parent and natural guardian; Antoinette Grace Gifford, an infant, by Laura Gifford, her parent and natural guardian; Nancy Hruska, an infant, by Barbara Hruska, her parent and natural guardian; Andre Moses, an infant, by Estella Moses, his parent and natural guardian; Catherine, Raymond and Annette Plawden, infants, by Mary Plawden, their parent and natural guardian; Lisa Turner, an infant, by Marie Turner, her parent and natural guardian; Denise Brennan, an infant, by Rosemary Brennan, her parent and natural guardian; and Jeffrey Scott Owen, an infant, by Marcia Owen, his parent and natural guardian.

The defendants below were: Ewald B. Nyquist, as Commissioner of Education; the University of the State of New York; Arthur Levitt, as Comptroller and Mario F. Procaccino, as Commissioner of Taxation and Finance of the State of New York.

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JURISDICTIONAL STATEMENT OF THE CITY APPELLANTS

Appellants appeal from the final judgment of the New York Court of Appeals entered on June 23, 1982, holding that New York's statute providing reduced assistance to the Rochester, New York City, Syracuse and Buffalo school boards and their students (herein the "city plaintiffs") does not violate the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the New York Court of Appeals, which appears in our separate Appendix, pp. 1-34, is reported at 57 NY2d 27. The findings of fact pertaining to the city claims issued by the Trial Court, updated and affirmed by the Appellate Division and accepted by the Court of Appeals, are not reported. They are reprinted in our separate Appendix at pp. 160-235.

JURISDICTION

The judgment of the New York Court of Appeals, finding no constitutional violation in the challenged statutory provision, was entered on June 23, 1982. A notice of appeal to this Court was duly filed on September 8, 1982, and appears in the separate Appendix at pp. 329-30. On September 13, 1982, Justice Marshall signed an order extending the time for docketing the case to and including October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISION AND STATUTE

The Fourteenth Amendment to the United States Constitution and the relevant provisions of the New York State school aid statute are set forth in our separate Appendix at pp. 331 *et seq.*

STATEMENT OF THE CASE

This appeal presents a constitutional challenge to the irrational reduction of State "equalizing" aid that the New York school finance statute accords to its big city school districts. The case commenced when property poor districts and their pupils filed suit against New York State's scheme of funding public education. Appellants here, the school systems and students from Rochester, New York City, Syracuse, and Buffalo, intervened to present their separate constitutional challenge. *These intervening plaintiffs assert discriminatory treatment by the statute of one million city public school pupils, most of whom are poverty-distressed minority group children.* Those children are not merely denied greater State help to overcome the learning disadvantages wrought by poverty, but are irrationally provided below average and reduced State school aid when their need for help is plainly the greatest. As a result of that reduced State support, vast numbers of city chldren lack needed school services and suffer educational underachievement, and many thousands are denied even the opportunity to achieve basic minimal skills or literacy.

Numerous trial witnesses described the plight of city schools under a State aid formula that purports to "equalize" the districts' schooling capacities but that so mismeasures the city districts' funding capacities that only below average and inferior aid is provided their students, including their disadvantaged children.[1] In four separate respects the State law discriminatorily diminishes payments for city children by assuming far greater urban district school funding capacity than actually exists. First, the statutory formula fails to recognize that the cities' school revenues are greatly reduced by much higher per capita costs for non-education services such as police, fire, and sanitation, which inexorably consume a disproportionate share of the cities' tax revenues. Second, the formula disregards the fact that costs of teachers and other staff and resources are substantially higher in cities than in smaller localities and rural districts, so that the education dollar in the city purchases fewer school resources. Third, the formula measures the tax base behind each pupil and dispenses the per pupil State share on the basis of average daily attendance rather than enrollment, thus penalizing the cities, which suffer from costly student absenteeism rates beyond their control. Fourth, even the State's supplemental funding for educationally disadvantaged and handicapped children is below average and reduced in the big cities, although those cities enroll the greatest concentrations of these most costly pupils.

Finding patent discrimination in the statute's "less favorable treatment of unequals," the Trial Court concluded that the statute's reduced payment to the cities lacks any rational basis, violating both the State Constitu-

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[1] The State's operating aid formula *purports* to equalize by providing additional assistance to school districts with a lesser capacity to finance schools. Its definition of such capacity is real property and income per attending student in each district. By that flawed definition, Rochester, New York City and Syracuse are deemed "wealthy" and therefore receive below average State aid for their students. Buffalo's aid is slightly above average but is also improperly reduced for the reasons set forth in the text.

tion and the equal protection guarantee of the Fourteenth Amendment. The Appellate Division affirmed the Trial Court's discrimination findings, emphasizing that contrary to the State Constitution's equal protection guarantee, the State law's unequal support to city education contributes to unparalleled pupil failure and illiteracy rates when it denies funds and resources which educationally disadvantaged children require. However, the Court of Appeals reversed, deeming *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) dispositive, though that case in no way involved state grants of below average and diminished aid to the hardest pressed school districts in the state (see *infra*, pp. 23, 26, 27).

Following this Statement of the Case, we urge as reasons for noting probable jurisdiction that 1) the rational basis requirement is clearly transgressed when a State aid statute provides city school districts overburdened with special need pupils below average and diminished assistance by a four-fold mismeasuring of their school funding capacities; 2) the Court of Appeals should have applied a stricter standard than rational basis to invalidate the aid law's disfavored treatment of city schools because thereby many thousands of educationally disadvantaged pupils are denied the resources to help them acquire even basic minimal skills or literacy, and 3) a stricter standard than rational basis is also applicable to invalidate the statute's inferior school support to the city schools, which educate the vast majority of the State's children coming from racial minorities and from poverty circumstances.

I. Historical Background

Public education was developed and made the special responsibility of the state particularly to provide the children of the poor a more equal chance in society. Thus, the founding New York law of 1812 established a public education system "in the expense of which the State would largely participate to bring

instruction within the reach and means of the humblest citizen," because "reading, writing and arithmetic . . . are essential to every person, however humble his situation in life" (1812 *Report of the Commission on Common Schools* 720, 724). Under the initial legislation the children of the poor nevertheless remained disadvantaged by "rate bills" charged parents to help pay the school costs; the abolition of rate bills was achieved at mid-century as a result of a national reform movement led by Horace Mann, who urged that the universal education which "prevents being poor" is "the great equalizer of the conditions of men" (L.A. Cremin, ed., *The Republic and the Schools* 85-87 (1957)). The historic 1850 Report on the State's first free schooling law by the Assembly's Select Committee (1850 *N.Y. Assembly Documents*, No. 150, at 6) similarly expressed the understanding that the State was bound to provide "schools which are open to all, where no one shall be excluded, whatever his race or comparative situation in life . . . and where all shall be on a perfect equality." In 1894 the egalitarian public education purpose was again reflected in the adoption of a constitutional clause requiring that the Legislature provide for the maintenance and support of a system of "free common schools wherein all the children of the State may be educated"; the education clause was appropriately named "the Children's Bill of Rights" by New York's preeminent constitutional historian (2 C. Z. Lincoln, *The Constitutional History of New York* 206 (1906)).

In succeeding years lack of revenue impaired schooling in many rural districts, prompting adoption in the 1920s of the "foundation" system of State aid directed to providing "apportionment [which] will vary according to the ability of the community to support its educational program" (1926 *N.Y. Senate Journal*, Vol. 2, *Executive Journal* 37). The foundation system's promise of equality, however, remains ephemeral, for the State's share of educational spending has diminished during a period when local inequalities of taxable wealth have been vast (OFF

9, A 116; OFF 12-14, A 117-20).[2] Even though the State provides "equalizing" school aid, the gap between the highest and lowest districts now reflects a 9-1 school spending disparity per pupil (Governor's 1982 Education Message 9). While the State's aid system to localities is thus inadequate to assure equal schooling for children in property poor districts, it is even worse in its *disequalizing* impact on children in the big cities. Large city districts most constrained in their funding capacity and overloaded in their teaching burdens are not yielded correspondingly greater compensating State assistance, but instead receive reduced and below average support under an aid formula which mismeasures their local school funding capacity.

As long ago as 1962, the Joint Legislative Committee on School Finance recognized the State law's flawed measurement of urban aid because the tax base available for education in other districts "is not equally available in an urban school district" (1963 *N.Y. Legislative Documents*, No. 11, at 165). The 1967 Report of the State's Board of Regents (p. 5) similarly emphasized that non-school municipal costs represent "a debilitating burden on the cities' capacity to finance necessary educational resources." In 1972 the Fleischmann Report to the Legislature (p. 105) again emphasized that "the rural bias in the original State aid formula has, by this time, become a suburban bias, even though now it is the *cities* which lack educational systems sufficient to the challenge of the day," because "a limited amount of public funds must be used to finance a large number of municipal services." When the Legislature nevertheless declined to reform the aid statute to take fair account of the unique city school

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[2] "A—" references are to the separate Appendix to this Jurisdictional Statement. In a few instances we have referred to the record before the Court of Appeals in a Joint Appendix; such citations appear as "JA ——." "IFF" references are to the findings of fact pertaining to the intervening city plaintiffs' claims; "OFF" refers to the findings of fact concerning the original plaintiffs' claims.

funding limitations and burdens, the city plaintiffs filed their intervention complaint in this suit including their claims based upon the Fourteenth Amendment. Their central claims of unequal treatment were sustained by voluminous Trial Court factual findings affirmed by the Appellate Division and accepted by the Court of Appeals.

II. The Trial Court's Findings and Conclusions

A. *The Statute's Four-Fold Mismeasurement of City School Funding Capacity*

Based upon evidence formidable in volume and depth of scrutiny—presented during an eight month trial—the Trial Court concluded that the State aid statute discriminates against children in the big cities in its four-fold mismeasurement of the funding capacities of big city school districts. As the Trial Judge found: "The State aid statute purports to equalize the disparate fiscal capabilities of the State's numerous school districts, including those located in large cities. It has been formulated in such a way, however, that when applied to the large city school districts, their capacity to finance public education with local resources has been overstated" (A 302). That "overstatement" results in severe reductions in the aid to which the city districts would be entitled if the formula properly measured their local school funding ability. Indeed, whereas some districts last year received amounts *exceeding $1,500 per pupil*, and the average district in the State other than the big city districts received $1,000 per pupil, Rochester, New York City and Syracuse received only $826, $931 and $935 respectively (IFF 140, A 179). This reduced aid exacerbates the plight of school districts burdened by the largest concentrations of special need pupils and by greatly restricted school funding capacity. In consequence, during the last school year New York City, serving vast numbers of disadvantaged children, ranked *fourth lowest* in spending per pupil among 161 school districts in the three downstate counties surrounding the City (*see* JA 6575-727). In-

deed, the City had $1,000 less per pupil to spend for its disadvantaged pupils than the *average* per-child outlay in those 161 suburban districts with their more fortunately circumstanced pupils.

As the Trial Court found, the State aid law's disfavored treatment of city schools, subjecting so many children to inferior schooling, arises from the formula's failure to give effect to: 1) municipal overburden, 2) higher city school costs, 3) higher city student absenteeism rates and 4) greater concentrations of special need students in the cities. We treat each of these in turn.

1. *Municipal Overburden*

For purposes of providing "equalizing" aid to school districts, New York's statute measures local capacity to finance schools by the value of local real property and income behind each of the district's students, and assumes that school districts throughout the State are equally able to draw upon their tax base for *school funds*. As the Trial Court found, that assumption is false for in city districts essential non-education services inexorably drain local revenues, reducing sharply those districts' ability to finance public education from local taxable resources (A 270-74). Unparalleled expenditures and tax levies for non-school purposes create a "fiscal imbalance" and prevent the city district "from devoting a normal proportion of its fiscal resources for education" (JA 1758, 1803-05).

As the Trial Court found, the higher noneducation expenditures in the cities that the aid law's local capacity measure disregards "are caused by the compelling, irresistible demands for municipal services that the urban environment and its characteristics create" (A 270). Those service demands and characteristics are detailed in its decision (A 269-73) and in more than one hundred findings of fact (IFF 18-130), which are reproduced in our separate Appendix at A 163-78. For example, the proportion of population below the poverty line in New

York City is more than 200% greater than in the neighboring counties (IFF 20, A 164), which means far larger welfare rolls. As the Court found concerning New York City, Buffalo, Rochester and Syracuse (A 271): "[c]oncentrations of the poor and the elderly, large numbers of persons on public assistance rolls, high levels of unemployment and low education levels have all combined to increase municipal expenditures. To the foregoing must be added the cost-producing factors of old housing stock, deteriorating municipal facilities and a severe economic decline in recent years." Municipal overburden also is reflected in specific disproportionate service needs for police, fire, public assistance, health, corrections, courts, mass transit, parks and recreation, housing and school construction.[3]

As a result, while jurisdictions outside New York's four largest cities were able to spend 45% of their local taxes for schools, the cities could spend only 28% (IFF 7, A 162). Measured in per capita terms, noneducation outlays were much higher in the four cities than in their surrounding counties and the rest of the State; in New York City $401.06 was the per capita expenditure from local revenue for noneducation purposes whereas only $183.17 was spent per capita in the rest of the State (IFF 14, A 163). The Court concluded that "New York's aid formula overstates the cities' capacity to finance their schools" by disregarding "the 'municipal overburden'

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[3] In a typical functional area, police services, the Court found that the four cities spend 2 to 6 times per capita more than their suburbs (A 271; IFF 54, A 169). This greater drain on the local tax dollar for police protection reflects a nationwide pattern in which the larger the city, the higher the per capita cost of police services and police employees (IFF 55, A 169). Based on undisputed testimony, the Court concluded that higher crime rates in the cities arose from their greater population density, poverty and unemployment and necessitated greater expenditures for police services. For example, the evidence showed that some city census tracts with high poverty and high unemployment had crime rates 50 to 100 times those of the suburbs or of city fringes (IFF 60, A 169).

drain of non-educational services on the local tax dollar" (IFF 3, A 162).

2. *School Costs Overburden*

The aid formula's disregard of the cities' municipal overburden which reduces their school resources is compounded by its distribution of aid on the assumption that the local school dollar has the same education resource purchasing power throughout the State's school districts. The assumption is false, as the Trial Court found, for the purchasing power of the education dollar is substantially less in metropolitan areas and particularly in the New York City metropolitan area (IFF 148-58, A 180-81). The average spending per pupil in metropolitan area districts is 29% higher than in rural districts for the minimum education program mandated by the State (IFF 150, A 180). Large city school districts, for example, must pay more to attract teachers who often view their schools as less desirable than schools in the suburbs (IFF 159-73, A 181-83). Contributing to this perception, the Trial Court found, are the problems in many city schools of large classes, with a high percentage of disadvantaged children, deteriorating buildings, limited supplies, violence and vandalism (IFF 161, A 182).[4]

The Trial Court concluded that the aid formula "[d]isregards the diminished power of the urban dollar in purchasing educational resources as a result of the higher cost factors in the cities" (A313).

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[4] New York City is particularly disadvantaged because it is in the high cost downstate part of the State. For the minimum education program directed by the State, average expenditure per pupil downstate was 47% higher than upstate (IFF 149, A 180). The higher costs downstate were also shown in teachers salaries, the largest component of the school budget, where the average salary in the New York City metropolitan area was 30% higher than upstate (IFF 155-56, A 181). As the trial court found, "[m]edian salaries for teachers by degree and experience level show that downstate districts must pay more than upstate to purchase the same educational resource" (IFF 157, A 181).

3. *Student Absenteeism Overburden*

The aid statute exacts a further toll from absenteeism-plagued city school systems in using attendance rather than enrollment as the measure of local funding capacity and of per-pupil aid entitlement.[5] The schools in New York's largest cities bear a burden of severe student absenteeism; the 16% average daily absenteeism rate of the State's five largest cities is almost triple the average elsewhere in the State (A 276; IFF 184, A 184). The problem is most acute in the secondary schools; in New York City's academic high schools over 26% of the students are absent on an average day (IFF 185, A 184; JA 4103).

On the basis of extensive testimony, the Trial Court found that city schools cannot prevent excessive absenteeism rates because: "the causes of high absenteeism in the large city school systems are traceable to poverty and its associated conditions. Some of the contributing conditions associated with poverty were shown to include higher incidence of illness among children from impoverished homes; lack of warm clothing in cold months; pupils kept at home to care for younger children in the family; lack of parental encouragement to attend school; impaired mental and emotional health; and lack of success in school" (A 277; IFF 191-201, A 185-86).

A class with 84% attendance still requires a whole teacher. High absenteeism produces not savings but greater costs for city school systems, because it generates the need for more attendance services and for costly

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[5] The statute measures district wealth for determining aid for each pupil unit on the basis of average daily attendance rather than enrollment and provides aggregate aid to the school district on the same "ADA" basis. A district's "wealth" or school funding capacity is first calculated by dividing its real property valuation by total wealth pupil units (TWPU), a construct based upon average daily attendance; because absenteeism renders the pupil count in the denominator artificially low, the city districts' wealth per pupil is overstated (IFF 179-80, A 183-84). The district's aggregate aid is then computed by a pupil count also based upon average daily attendance.

repetition and remediation programs to assist children whose learning is hampered by irregular attendance (IFF 186, 188, 189, A 184-85). Yet instead of helping the cities to meet the additional schooling burdens from severe absenteeism rates, the statutory formula doubly reduces support to the cities on that account (see p. 11, n.5 *supra*). The Trial Court concluded that the formula's use of an attendance-based pupil count "disregards the increased school costs caused by the far higher rates of student absenteeism prevailing in these city school districts and actually penalizes the city school districts for their higher student absenteeism" (A 313).

4. *Special Need Student Overload*

A fourth discrimination in the statute is its below average and reduced supplemental help for the cities' special need children. New York's largest cities have unparalleled numbers and concentrations of disadvantaged, handicapped and other students with special school needs (A 314). For example, in the four city districts which enroll 37% of the State's pupils, some 56% of the State's educationally disadvantaged pupils are concentrated (IFF 217, A 188); yet their additional State aid for such students is below average and reduced.

The State formula, as the Trial Court found, "recognizes that pupils who are disadvantaged, handicapped or have other special needs require costly special services intended to cope with the difficulties such pupils encounter in acquiring their education" (A 278). This recognition is in the form of added weightings in the calculation of aid for disadvantaged and handicapped students. But as the Trial Court concluded: "While the weightings furnished extra aid, the aid from such weightings has itself been reduced because the weightings have been integrated with a measure which has, at an earlier step of computation, treated the urban districts as less in need of aid than they actually were. The flawed result of a process intended to help meet the added costs of educating

disadvantaged and . . . handicapped pupils has been, according to the evidence, to provide reduced and below-average assistance to the cities burdened with the greatest numbers and concentration of pupils in those categories" (A 279).

On the basis of the foregoing detailed factual findings concerning the statute's four-fold mismeasurement of the cities' school funding capacity, the Trial Court concluded that the "failure to provide State aid on an equitable basis deprived the children in the large city districts of an equal education opportunity" (A 292). Its central ruling was that the statute's inferior support for city schools and children does not pass muster under the rational basis test. The formula's failure to give effect to the factors uniquely burdening the big cities works "an arbitrary and irrational deprivation of state aid" that violates the Fourteenth Amendment of the United States Constitution (A 314). In that respect the formula was found to contravene the statute's own "major purpose" of "equalizing the varying capabilities of the State's school districts to finance public education" (A 302). In failing to recognize that municipal overburden and other factors inexorably reduce the city districts' capabilities to finance education, the statute classifies them as less needy of aid—a classification found to bear "no reasonable relation to the statute's purpose of providing state aid to districts in proportion to their need" (A 303, 305).

B. *Injurious Impact of Reduced State Aid Upon Educationally Disadvantaged Students in the Cities*

While all city children suffer from the reduced State aid, the Trial Court found particular injury to educationally disadvantaged city pupils. In the Trial Court's ultimate equal protection ruling, it was a vital consideration that *the arbitrary four-fold reduction in the State's school payments to city districts harms the children with the greatest need for quality education and extra school resources.* As the Trial Court found, poverty is the over-

whelming reality for most city school children and is the root cause of their educational disadvantage (IFF 247-56, A 194-95).[6] The resulting educational problems that require expensive remedial services denied by the statute's reduced aid to the cities were organized by the Trial Court under several major subjects (A 284-90):

Impaired learning readiness. Poverty in New York's large cities, with its concomitant lack of adequate housing, food, pre-school experience, and parental instruction and supervision, often puts city children significantly behind even as they enter school (IFF 259-62, A 195-97). Many inner city children begin school without knowing even basic colors or body parts, not comprehending concepts like "same," "different," "in front of," and "beside," not understanding the language of the teacher, unable to follow verbal directions or use pencils and scissors. Such children spend their initial schooling struggling to learn these skills and concepts and fall behind quickly unless they receive prompt special attention and assistance—which requires resources the aid law now denies to city schools (A 196-98, 285).

Impaired learning progress. The conditions that handicap the cities' poor children as they begin school—inadequate nutrition, clothing and medical care, crowded and substandard housing, and lack of supervision and instruction—often continue throughout schooling to exert their detrimental influence (IFF 272-273, A 199). Such conditions "produce a cluster of adverse effects upon chil-

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[6] State data updating the findings show that as measured by the standard that makes children eligible for free school lunches, 55% of New York City's pupils—some 515,000 children—are poor, as are half those in Syracuse and Rochester and two-thirds of the school children in Buffalo. Moreover, more than 70% of all the State's poverty children are in the four cities. (Approved Applications for Free Lunch, State Education Department, Bureau of School Foods Management, March 1982 Program Data for All Schools, CN 348, 8/20/82.) At the time of trial New York City alone had two-thirds of the State's AFDC recipients. (A 284; IFF 248, A 194).

dren's work in school, that include distraction from school work, undone homework, disruption of the progress of learning in a sequential manner, and lack of motivation to attend school and to achieve" (A 285-86; IFF 274, A 200).

Mental and emotional problems. Disproportionate numbers of the big city children suffer from severe mental and emotional problems that are caused or aggravated by urban poverty circumstances (IFF 286-90, A 202-04). The result is impairment in school performance; reading difficulties, thinking slowly, and low intellectual functioning; and juvenile delinquency and withdrawn or disruptive behavior in the classroom (IFF 290, A 203-04), all of which require expensive extra resources for their remediation.

Impaired physical health. Sickness and physical disabilities, likewise rooted in poverty conditions and attendant inferior medical care, are much more common among poor children (IFF 304-315, A 206-08). In consequence, city children have more sick days and injuries, more resulting school absence, and often suffer from uncorrected vision problems, hearing deficiencies, and malnutrition—conditions that limit participation and comprehension in school and call for costly remedial services (e.g., IFF 307-10, 316, A 206-07, 208).

Handicapping conditions. The city schools enroll a highly disproportionate number of pupils with handicapping conditions for whom expensive testing, evaluation and special education are mandated by law (IFF 323-45, A 209-12). The four city plaintiffs, with 37 percent of the State's public school enrollment, have 57 percent of the State's most costly handicapped pupils (those requiring special programs three-fifths or more of each school day) (IFF 324, A 209-10).

Limited English proficiency. Most of the State's more than 100,000 children with limited or no facility in English are in city schools, and by law must receive special

and more expensive instruction enabling them to participate in school in English (IFF 363-65, 369-70, A 219, 220).

Occupational education. A disproportionate number of city pupils seek to go into trades; the percentage of occupational education enrollment in the three upstate cities is two to three times that of their suburbs (IFF 381-84, A 222-23). Vocational education costs hundreds of dollars more per pupil because it requires high capital outlay, more highly skilled teachers, and smaller class sizes (IFF 385-87, A 223).

The Trial Court found that additional but costly education resources now denied by the statute's reduced support could alleviate or cure each of the foregoing conditions that particularly afflict city school children. With the provision of proper educational resources and programs, learning barriers which are "largely the products of poverty" can be "remedied or substantially ameliorated" (IFF 257, 428; 264, 277, 291, 317, 396-99, A 195, 229; 197-225). But successful compensatory education requires concentrated resources which entail extra costs; and lack of funds exacerbated by the arbitrarily reduced State support to city schools leaves them unable to provide the services that could help disadvantaged children succeed in school. For example, "The cities, with their reduced State aid, cannot afford to provide the services necessary to test, evaluate, treat and instruct all of their handicapped children" (IFF 354, A 214). "The cities, with their reduced State aid, cannot afford to develop adequately the English language facility of their great concentrations of pupils who speak and read little or no English" (IFF 377, A 221; see also IFF 268, 278-80, 293-303, 318-22, 350-53, 355-59, 376, 378-80, 385-91, 397-408, A 198-226). Indeed, among the successful experimental programs described at trial, all of which reached only a small percentage of special need pupils, lack of funding required many to be cut or eliminated altogether (e.g., IFF 271, A 198).

Numerous witnesses described the effect upon disadvantaged city school children of school funding and resource shortages exacerbated by the State law's inferior support to the cities. Thus, according to a Rochester kindergarten teacher, in a simple test of basic concepts administered to her entering class, 29 of 30 five-year olds could not determine whether a book was upside down, 29 of 30 could not mark the picture of the object that rhymed with "spoon," 24 of 30 could not determine that the nose was missing on the picture of a girl, and 24 of 30 could not identify a picture of an apple cut in half. Yet classes last only half a day, are taught by a single teacher without assistance, and have 32 to 33 children each, and sometimes more. Large numbers of children leave such underfunded kindergartens unprepared for first grade; at year's end, one-fourth of the school's kindergartners were held back, and of those sent to the first grade half were unready (JA 2486-527).

Junior High School 65 in lower Manhattan is situated in an area characterized by extreme economic deprivation, inadequate and limited social services, dense population and deteriorated and crowded housing. Students live in apartments where they lack even a bookshelf, let alone a place to study and do homework. Although they are only twelve to fourteen years old, over half of them work long hours in restaurants and garment factories. Many are immigrants who know little or no English, and some arrive totally illiterate even in their own language and must be taught rudimentary skills.[7] For lack of resources, in the year before trial the school had English as a Second Language classes for only 270 pupils, with 30 in each class, which means a maximum daily time for practice in

[7] There are teenage Dominicans, for example, who come "with a completely clean slate and, when I say a clean slate, I mean that they do not know the alphabet. We must take them and teach the A-B-C-D, we must teach them what a word is. We then have to teach them sentences. They do not know the number system. . . . They use tally marks. . . ." JA 3053-54.

speaking of 90 seconds per child. At least 600 children in the school are unable to function adequately in English and half the 7th graders read at 4th grade level or below. The whole school of 1800 pupils can afford only two remedial reading teachers and only one counselor, though hundreds of pupils need counseling for severe academic and social problems that impede their learning (JA 3048-90, 3181-95).

Charles Evans Hughes High School in New York City is attended almost exclusively by low-income students yet lacks the school resources that such pupils require. When ninth graders were tested 36 percent did not even appear; of the remainder (excluding limited English proficiency and mentally retarded students), 70 percent were two years or more behind in reading and over 25 percent read at a fourth grade level or below. Some students "are illiterate. They may know some of the letters of the alphabet but not all of them. They may not know the sounds that those letters make." Most others can decode the words on a page but cannot understand them; they do not connect reading with thinking. The students are unable to use graphs or maps or indexes; some "may not be familiar with the fact that Europe is an area, that it is not a city or a country or a state in the United States." Of 819 students who had entered the last graduating class at Hughes, only one-third remained as seniors and fewer than a fourth of those who started actually received diplomas. The majority of those who drop out do so "because of academic problems that include poor reading ability, poor math ability, and truancy problems that are tied up with poor reading ability and poor math ability and poor basic skills" (JA 3292-310).

These situations are replicated in other schools throughout the big cities. The Trial Court found that the cities' inability to afford remediation for such problems "has had effects on a great number of pupils that are both serious and tragic" (A 290). It noted that 16% of Roch-

ester twelfth graders read at fifth grade level or below (IFF 411, A 226), that thousands of New York City ninth graders scored at fourth or even third and second grade levels in reading tests (IFF 412-13, A 226-27), and that the cities' pupils are clustered in the bottom levels in the State's testing program (IFF 417-23, A 227-28). Although such "problems of educational failure and severe underachievement can be remedied or substantially ameliorated," the State's reduced payments to the city schools mean that they "cannot afford to provide effective remedial education to all their students who are underachieving and failing in school," and as a result "thousands of students in the big city school districts fail to achieve even basic minimal skills" (IFF 409-38, A 226-30). The Trial Court found that "large numbers and concentrations of pupils in large urban school districts, seriously deficient in basic minimal educational skills are denied an opportunity for meaningful participation in the educational program" (A 308).

The poverty from which both city children and city schools suffer simultaneously creates acute learning problems for poor children and drains the cities of the funds needed to deal with those problems. Yet instead of receiving extra school help, under the State school aid law impoverished children with the greatest schooling needs experience a public education that is itself impoverished. As a result, "[m]any disadvantaged pupils receive not compensatory education and enrichment, but lesser resources than pupils elsewhere because class size and pupil-staff ratios in the cities are among the largest in the State, while facilities and support services are among the most constricted" (IFF 284, A 202). The Court concluded (A 308) that "'[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike' . . . If equal treatment of unequals is discriminatory, then providing less favorable treatment of unequals has to be regarded as even worse discrimination."

III. The Ruling of the Appellate Division

The Appellate Division reviewed and affirmed all of the Trial Court findings relating to the city plaintiffs' claims (A 160-235). Thereby it confirmed the existence and fiscal impact of the cities' municipal overburden, costs overburden, student absenteeism overload and special need pupil concentrations, as well as the discriminatory impact on disadvantaged children of a statute that disregards these realities in providing inferior support for city schools. The Court went on to formulate additional findings concerning the results of "budgetary constraints resulting from the operation of the school financing scheme" (IFF 447-75, A 231-35). For example, in Buffalo the entire elementary school library system had been eliminated (IFF 474, A 235); New York City and Buffalo were fiscally unable to provide vocational education for all students seeking to enroll (IFF 452, 461, A 232, 233); Buffalo schools were impeded in providing bilingual education, remedial mathematics and remedial reading programs for children in grades four through eight (IFF 460, A 233); and thousands of handicapped children did not receive appropriate help and remediation because of lack of funds (IFF 466-68, 473, A 233). A special concurring opinion by Judge Weinstein underscored that in denying equal treatment and needed resources to the city schools, "the education aid formula has a disproportionately adverse effect not only on pupils from impoverished families, but also with respect to race, country of origin and alienage" (A 72).

Though it found no violation of the Federal Constitution, the Appellate Division affirmed the Trial Court's conclusion that the equal protection clause of the State Constitution is transgressed by its "arbitrary deprivation of state aid" due to the aid formula's failure to recognize municipal overburden, the higher city school costs, the absenteeism overload, and its reduced supplemental assistance for special need pupils in the cities (A 93-94). It further found that the aid formula "denies equal educa-

tional opportunity and equal treatment" to children in city school districts which "have the most difficult and most expensive school populations to educate," because it "fails to give fair and adequate consideration to their special and severe educational overburdens" (A 94).[8]

The Appellate Division opinion (A 68-69) concluded with the emphasis that "*unconscionable numbers of children fail to acquire basic educational skills*" and that the New York State school finance scheme "*is in good measure a cause for the failures*":

> "We cannot ignore the findings that thousands of children fail to acquire even minimal skills in reading, vocabulary and mathematics in lower grades and later underachieve or fail because they lack those skills; that thousands who pass through the school system can only decode words without comprehending them, cannot use graphs, maps or indexes, and cannot apply acquired knowledge—minimal as it may be—to solve problems; that thousands who attend high school read at a fifth grade level or below and some of these read at a third or even second grade level; and that some students leave the system wholly illiterate. . . .
>
> We harbor no illusion that all the failings in pupil achievement we have described flow from incompetence of the educational system, for we are aware of other deep-seated societal and familial failures which contribute in substantial degree to the prob-

---

[8] The Appellate Division emphasized that by 1980-81 "New York City's percentage of the State's special needs pupils had risen to 51% as against 33% of the public school enrollment and 29% of [State] education operating aid," and that "disproportionately low State aid to the cities continues" (A 48). The Court thereby echoed the concession of defendants' own chief expert witness (Lois Wilson of the State Division of the Budget) who agreed that there are "basic inequities in the present formula in the amount of money it provides for the City of New York," particularly in view of "the proportion of pupils with special educational needs in the City of New York [and] the problems of full valuation per resident WADA as a measure of wealth for the City of New York" (JA 5048).

lems of educating disadvantaged youth. Nevertheless, the record before us establishes that many of the children who fail to obtain minimal skills are educable and that properly staffed remedial programs, which afflicted school districts are prevented from providing because of fiscal constraints and misallocation of resources, do alleviate or totally remedy learning problems. In sum, despite their disadvantaged background, many of those who leave New York's education system undereducated could be provided with skills which would equip them for life's future demands."

IV. The Ruling of the Court of Appeals

The Court of Appeals opinion accepts the "factual determinations made by both courts below" (A 11), including the extensive findings of the schooling disadvantages suffered by children in the city districts. Specifically it notes that "in consequence of the economic factors of metropolitan overburden the net effective economic ability of the city districts falls well below that of non-city districts," and it accepts the findings that "the four major cities represented by the intervenors . . . are forced to provide instructional services and facilities of a lesser equality, variety and quality. . . ." (A 12). Moreover, the Court concedes the presence of "great and disabling and handicapping disparities in educational opportunities across our State, centered particularly in our metropolitan areas . . .", and also recognizes "the existence of the very real disparities of financial support as found by the lower courts" (A 23, 13). The Court nevertheless applies to the school finance law the least exacting "rational basis" equal protection standard, and reverses without even suggesting what basis justifies the recognized schooling inequalities which the State's "equalization" formula thrusts upon city children. Although the Court refers to the competition for urban dollars between schools and other urban services (A 15)—pressures which the lower courts found to be inexorable—it nowhere suggests what basis justifies the State formula's reduced sup-

port to the cities by its four-fold mismeasurement of their school funding capacity.

A forceful dissenting opinion by Justice Fuchsberg emphasizes that the "simplistically conceived 'equalization' formulae are the cause of a perverse disequalization effect on education" in the big cities (A 28). The opinion underscores that the cities' aid entitlement is multiply mismeasured by the statutory aid formula (A 27-28), and that "the failure to provide State aid on an equitable basis deprives the children in the large city districts of an equal education opportunity" (A 29). Such unequal treatment, the dissent further emphasizes, puts this case well beyond *Rodriguez*, where *"there was no claim that the statute malapportioned State school aid by mismeasuring the funding capacities and needs of city districts"* (A 33). That city plaintiffs' claim here, presenting issues never addressed in *Rodriguez*, invokes vital equal protection questions for this Court's review.

SUBSTANTIAL FEDERAL EQUAL PROTECTION ISSUES ARE HERE PRESENTED FOR REVIEW

1. *A primary question for review arises from the lack of any manifest rational basis suggested by the Court of Appeals to justify the inferior treatment that the New York statute thrusts upon students in big city districts, most of whom are educationally disadvantaged pupils.* In a detailed opinion, supported by hundreds of factual findings affirmed by the Appellate Division and accepted by the Court of Appeals, the Trial Court concluded that the statute's disregard of the four city overburdens is arbitrary and discriminatory in its resulting reduced support to city districts and their children. The Trial Court particularly noted that the purpose of the statute is "to equalize the ability of the State's public school districts to finance education" (IFF 1, A 160); yet in its overstatement of the cities' ability, resulting in a sharp reduction of State aid, the formula disserves its "equalizing" purpose (cf. *Weinberger* v. *Wiesenfeld*, 420

U.S. 636, 651-52 (1975)). Instead of the exceptional State aid to which the city districts are entitled by any fair equalization formula, they do not even receive the average level of State support. As to the city school systems with their vast numbers of educationally disadvantaged children with greater schooling needs, the law is patently discriminatory, providing "less favorable treatment to unequals."

Yet nowhere does the Court of Appeals rationalize the statute's four-fold mismeasurement of the school funding capacities of the cities. Thus there is no rejoinder to the lower courts' finding that the statute overstates city funding capacity because a disproportionate share of the city revenue base is inexorably taken by non-school services and thus unavailable for education. The school finance formula indulges in the fictitious assumption that taxable resources are as available for education in the cities as elsewhere, an assumption that the lower courts found results in a vast overstatement by the formula of the cities' school funding capacities and an arbitrary reduction in their share of State support.

Another arbitrary inequality in the aid formula which the Court of Appeals ignored flows from the misassumption that the education dollar has the same purchasing power in the cities as elsewhere. In New York's large cities, the school revenue derived from the local tax base purchases fewer teachers and other staff and resources. For a capacity-based "equalizing" aid statute to ignore this reality is to malapportion aid payments by mismeasuring the differences in school funding capacity that it purports to redress.

Equally ignored by the Court of Appeals are the lower courts' findings that the formula overstates the assumed funding base of the cities in measuring that base and dispensing aid by average daily attendance rather than by full student enrollment. Finding that severe absenteeism in the big cities is the inexorable result of urban poverty conditions, the lower courts concluded that the use of

the attendance standard that reduces State support is the more unjustified because high absenteeism requires additional expenditures to bring in truant students and to help those who have missed days of instruction.

Nor does the Court suggest any justification for the formula's reduced special support for disadvantaged and handicapped students in the cities. The enormous concentration in the four cities of the State's special need children, who require costly compensatory services, multiplies geometrically the problems in the urban classroom. Yet instead of providing more "disadvantaged" and "handicapped" supplements for such city children, the statute arbitrarily provides fewer dollars for their education.

Notwithstanding the unchallenged findings that the statute indulges in this four-fold mismeasurement of the city districts' aid entitlement, the Court of Appeals denies relief without ever suggesting a rational basis that could justify the State's inferior treatment of the city schools where most of the State's educationally disadvantaged children receive their preparation for adult responsibilities. Without questioning the lower courts' factual conclusions concerning the cities' unique overburdens disregarded by the school finance law, the Court of Appeals adopts a sweeping abstentionist posture that leaves public education inequality beyond any constitutional remedy. Whereas New York's lower courts specified in detail the facts that deprive the school aid statute of any rational basis for its reduced support to city children, the Court of Appeals provides no explication at all of its ruling against the city plaintiffs' equal protection claims. This Court recently ruled in *Zobel* v. *Williams*, —— U.S. ——, 102 S.Ct. 2309 (1982), that a state must show a tangible rational basis to justify giving some of its citizens less financial aid than it gives to others. Surely the rule in *Zobel* is no less applicable here, where by arbitrarily giving hundreds of dollars less support for the education of each city school child the

State diminishes the learning resources provided those with the greatest need for quality schooling.

2. *An equally substantial issue arises from the Court of Appeals' application of the least rigorous equal protection standard, even though the State's reduced support to city schools leaves many thousands of their disadvantaged children unable to gain even basic minimal skills or functional literacy.* The Court of Appeals woodenly applied *Rodriguez* to the city plaintiffs' claims, testing the discriminatory treatment of city school children by the rational basis standard; but unlike the Texas finance law which especially aided poor districts with low funding ability, New York's statute perversely compounds the fiscal distress of the city districts with its dispensation of arbitrarily *reduced* aid. Moreover, unlike *Rodriguez*, where this Court noted (411 U.S. at 37) that "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire . . . basic minimal skills . . .," here that charge was not only made but proven. As the Trial Court found, "Many pupils fail to acquire basic minimal educational skills. . . . In its restriction of aid to these city districts and its disregard of their educational burdens the aid statute denies such children equal opportunity to acquire basic minimal educational skills" (A 314). The Appellate Division similarly found that in large measure due to diminished and insufficient State support for education in the cities, many children who could achieve are not becoming educated and some remain "wholly illiterate" (see pp. 21-22 *supra*).

These findings of discriminatory statutory treatment resulting in denial of opportunity to become educated—findings left unimpaired by the ruling below—invoke the same considerations which recently impelled this Court to apply the intermediate "substantial relationship" standard of equal protection in *Plyler* v. *Doe*, —— U.S. ——, 102 S.Ct. 2382, 2398 (1982). Of course, in *Plyler* there was total denial of free schooling to illegal aliens

whereas here it is the State's below average and reduced school support that is contributing to the creation of an uneducated "subclass" in New York's big cities (102 S.Ct. at 2401-02). But in terms of adverse impact both on the child and on society the results here are no less severe than they were in Texas, for many thousands of children each year must remain illiterate when New York State's unequal aid to the cities deprives them of means to address severe learning disadvantages suffered by so many children. Under circumstances highly analogous to those decisive in the recent *Plyler* ruling, the refusal of the Court of Appeals to apply the intermediate "substantial relationship" standard of equal protection presents an important occasion for this Court's review. For if that is the applicable test, there is nothing here presented that could possibly meet that standard's requirement of an *"exceedingly persuasive justification"* to excuse the State's unequal treatment of its school children. See *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981); *Mississippi University for Women* v. *Hogan*, —— U.S. ——, 102 S.Ct. 3331, 3336 (1982).

3. *An additional equally substantial question arises from the fact that the statute's discriminatory treatment of city districts thrusts school inequality on the vast majority of the State's children from racial minorities and from poverty circumstances.* In its inferior treatment of city schools the statute diminishes the education available for the vast preponderance of the State's children who come from racial minorities and the great majority of those who live in poverty. Accordingly, the Court of Appeals' rational basis approach conflicts with this Court's ruling applying rigorous constitutional review to unequal public education benefits for members of suspect classes (*Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *Toll* v. *Moreno*, —— U.S. ——, 102 S.Ct. 2977 (1982), and invokes the considered caveat of *Rodriguez* (411 U.S. at 22-23, 26) concerning a public school finance system which provides inferior education to the state's poor children.

At the time of the trial below, of the 565,293 black school children in the entire State, 80.5% were in the four city school systems that receive diminished State school support (JA 2399-2400). As of 1981 this concentration remained unchanged—among the State's 517,007 black school children 79.5% were in the four big city school systems (*Racial/Ethnic Distribution of Public School Students, 1980-81*, State Education Department, Albany, N.Y.). Similarly, among the 329,964 Hispanic school children in the State, 89% were in those same city school systems, and New York City alone accounted for 87.1% (*id.*). In sum, among the State's school children who are blacks and Hispanics, 83.1% attend city schools discriminated against by the State finance formula. Moreover, among the State's entire population of poverty children over 70% are in the four big city school systems (see *supra*, p. 14 n.6). Thus, *when measured by its impact on suspect racial and national origin classes and by its impact on the poor, the State's school aid law clearly disadvantages discrete and insular minorities whose relative powerlessness invokes exacting constitutional protection against unequal statutory treatment—overcoming the presumption that inequality will be rectified by the democratic process.* Cf. concurring opinion of Justice Blackmun in *Toll, supra*, 102 S.Ct. at 2989. Surely no more to its poor and minority group children than to its illegitimate children may the State deny "substantial benefits accorded children generally." *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973).

That is the central thrust of the concurring opinion by Judge Weinstein in the Appellate Division (A 69-76). Reviewing data reflecting the enormous numbers of the State's minority group and poor children concentrated in the big cities, he emphasized that "the education aid formula has a disproportionately adverse effect not only on pupils from impoverished families, but also with respect to race, country of origin and alienage" (A 72). The opinion accordingly urges application of the

heightened standard of equal protection because the statute "has a disproportionately adverse effect with respect to so important a right as education on the vast majority of the State's minority students. *Minority children with greater needs are receiving not equal, but less aid*" (A 75). In like vein, the dissent by Judge Fuchsberg in the Court of Appeals emphasizes that the State's formula has adverse affect "not only on pupils from impoverished families, but also on a large percentage of the nearly 750,000 'minority' students in the State," presenting an issue of discrimination arising from "the inability of these cities, left bereft of the means to do so, to cope with the social and education breakdown affecting a large group identifiable by race, country of origin or alienage" (A 33). The opinion concludes that "poor children no less than rich . . . are entitled to an education that prepares today's students to face the world of today and tomorrow" (A 34).

It is thus of ultimate import that the statute subjects the vast majority of the State's racial minority and poor children to inequality, thrusting educational underachievement and school failure on so many of the least fortunate in our society. Since the statute gives unequal treatment to the State's black and Hispanic pupils, there may be no need here also to resolve the poverty question left open by *Rodriguez* (411 U.S. at 22, 26)—whether equal protection permits a school finance scheme "designed to operate to the peculiar disadvantage of the comparatively poor." Nevertheless, it is significant that the statute subjects to systematic denial of equal education 70% of the State's poverty children clustered in the four city school systems. When the politically powerless poor and minority children are denied equal opportunity in a public system, there is every reason for application of the "searching judicial inquiry" that remains the historic promise of *Carolene Products*.[9]

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[9] Moreover, the general inferiority of public education for the poor takes on added equal protection significance when it is con-

CONCLUSION

The unequal treatment to which the New York statute subjects most of the State's educationally disadvantaged, racial minority and poverty children cannot survive the Fourteenth Amendment's guarantee when measured by the rational basis test, and even more obviously when tested by the more exacting standards the Court of Appeals should have applied. Surely only a most cogent justification could excuse an "equalizing" statute's mismeasurement of local schooling capacity in the cities, when the resulting diminution of educational resources means reduced achievement that will haunt children throughout their adult lives and impair their opportunity for a productive role in society. The absence here of any cogent justification makes this a vital case for vindication of school children's rights under the Fourteenth Amendment's equal protection guarantee.

It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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sidered that it was particularly for the *benefit* of the poor that the State originally established public education. (See pp. 4-5 *supra*).

82-639

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD OF EDUCATION,
CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, *et. al.*,

Appellants,

—v.—

EWALD B. NYQUIST,
COMMISSIONER OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

APPENDIX TO JURISDICTIONAL STATEMENT OF THE CITY APPELLANTS

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Opinion and Order of the New York Court of Appeals, dated June 23, 1982

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT et al., Respondents-Appellants, and BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER et al., Intervenors-Respondents-Appellants, v EWALD B. NYQUIST, as Commissioner of Education, et al., Appellants-Respondents.

Argued May 10, 1982; decided June 23, 1982

SUMMARY

CROSS APPEALS from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 26, 1981, which modified, on the law and the facts, and, as modified, affirmed so much of a judgment of the Supreme Court (L. KINGSLEY SMITH, J.; opn 94 Misc 2d 466), entered in Nassau County, as declared that the State's system for financing public elementary and secondary schools violates the equal protection clause and the education article of the New York State Constitution (art I, § 11; art XI, § 1) as to plaintiffs and intervenor-plaintiffs, and the equal protection clause of the Federal Constitution (14th Amdt, § 1) as to intervenor-plaintiffs. The modification consisted of (1) deleting so much of the judgment as declared that the system cannot be justified by valid objectives and that the actual operation thereof does not bear a rational relationship to the objectives for which it was devised and substituting a declaration that the system presently impinges upon the important right of education guaranteed by section 1 of article XI of the New York Constitution in the plaintiff and plaintiff-intervenor school districts; that the system fails to further the asserted State interest in preserving local control over education in these districts, and that there are methods of financing public school education which would further local control over education with less intrusion upon the guaranteed right of education, and that accordingly, the State's public school finance system violates the equal protection clause of the New York Constitution (art I, § 11), (2) deleting the words "and irrational" from so much of the judgment declaring that the result of the State aid formula is "an arbitrary and irrational deprivation of State aid", and (3) deleting so much thereof as declared the State's financing system to be

unconstitutional under the Federal Constitution and substituting a declaration that the system is constitutional under the Fourteenth Amendment to the United States Constitution.

This declaratory judgment action challenging the method of financing the State's public schools was instituted in June, 1974, by the boards of education of 27 school districts and 12 students of public schools located in some of those districts. The intervenor-plaintiffs are the boards of education, officials, resident taxpayers and students in the Cities of New York, Buffalo, Rochester and Syracuse, together with a federation of parent and parent-teacher associations. The original plaintiffs, considered to be "property poor" school districts, contend that the present State system for financing public schools, as principally set forth in sections 2022 and 3602 of the Education Law, by which funds raised by locally imposed taxes are augmented by allocations of State moneys in accordance with a variety of formulas and grants, violates the equal protection clauses of the State and Federal Constitutions and the education article of the State Constitution because the system results in grossly disparate financial support in the school districts of the State. The intervenors, although not claiming to be disadvantaged in their ability to raise gross revenue from local sources, also assert violations of the same constitutional provisions as a result of circumstances, peculiar to cities, which result in special financial burdens. Trial Term issued a judgment declaring that the State's public school finance system violated both the equal protection clause (art I, § 11) and the education article (art XI, § 1) of the State Constitution and, as to the cities represented by the intervenors, the equal protection clause of the Federal Constitution as well. The Appellate Division modified by rejecting the conclusion that the intervenors had also established a violation of the Federal Constitution.

The Court of Appeals modified, and, in an opinion by Judge JONES, directed that judgment be entered declaring that the present statutory provisions for allocation of State aid to local school districts for the maintenance and support of public elementary and secondary education are not

violative of the equal protection clause of either the Federal or State Constitution, nor are they unconstitutional under the education article of the State Constitution.

Board of Educ. v Nyquist, 83 AD2d 217, modified.

HEADNOTES

Constitutional Law — Equal Protection of Laws — Public School Financing System

1. The existing provisions for State aid to finance public education in this State do not violate the equal protection clause contained in the Fourteenth Amendment of the United States Constitution, notwithstanding disparities in per pupil expenditures among the State's school districts, resulting largely from the differences in the revenue available for educational purposes in consequence of unequal real property tax bases or unequal demands on local revenue. Applying the rational basis standard of equal protection review, no impermissible discrimination against pupils in the less property-wealthy districts is found, there being a rational relationship to a legitimate State purpose, here the permission and encouragement of participation in and control of public schools at the local district level. Nor does the present school finance system discriminate against large city school districts, since inequalities existing in cities are the product of demographic, economic and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction.

Constitutional Law — Equal Protection of Laws — Public School Financing System

2. The existing provisions for State aid to finance public education in this State do not violate the equal protection clause of the New York State Constitution (art I, § 11), notwithstanding disparities in per pupil expenditures among the State's school districts, resulting largely from the differences in the revenue available for educational purposes in consequence of unequal real property tax bases or unequal demands on local revenue. Applying the rational basis standard of judicial review, the present school financing system has not been shown to be without a rational basis, since the justification for such system, the preservation and promotion of local control of education, is both a legitimate State interest and one to which the present financing system is reasonably related; any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts would inevitably work the demise of local control of education available to students in individual districts. Nor can the present school finance system be found to discriminate against large city school districts, since inequalities existing in cities are the product of demographic, economic and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction.

Constitutional Law — Education of All Children of State — Public School Financing System

3. The present school financing system does not violate the education article (art XI, § 1) of the New York State Constitution. This article, requiring the Legislature to provide for maintenance and support of a system of free schools in order that an education might be available for all children, makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district; nor does it provide that districts choosing to provide opportunities beyond those that other districts might elect or be able to offer be foreclosed from doing so, or that local control of education, to the extent that a more extensive program were locally desired and provided, be abolished.

POINTS OF COUNSEL

Robert Abrams, Attorney-General (*Amy Juviler, Shirley Adelson Siegel, Clement H. Berne* and *Evelyn Tenenbaum* of counsel), for appellants-respondents. I. The educational finance system, a reasonable, effective response to the educational demands of children and school districts does not violate equal protection of the laws. (*Matter of Levy*, 38 NY2d 653, app dsmd *sub nom. Levy v City of New York*, 429 US 805, 966; *Montgomery v Daniels*, 38 NY2d 41; *Matter of Van Berkel v Power*, 16 NY2d 37; *Nettleton Co. v Diamond*, 27 NY2d 182, app dsmd *sub nom. Reptile Prods. Assn. v Diamond*, 401 US 969; *Matter of Taylor v Sise*, 33 NY2d 357; *Lincoln Bldg. Assn. v Barr*, 1 NY2d 413, 355 US 12; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326; *Dandridge v Williams*, 397 US 471; *McGowan v Maryland*, 366 US 420.) II. The court below made a fundamental error in interpreting the education article of the State Constitution to mandate a very expensive education in which fewer children fail minimum competency examinations and which cannot be affected by a district's limited local tax base. (*Donohue v Copiague Union Free School Dist.*, 47 NY2d 440; *Judd v Board of Educ.*, 278 NY 200; *Matter of Viemeister v White*, 88 App Div 44, 179 NY 235; *Matter of Sperry Rand Corp. v Town of North Hempstead*, 53 Misc 2d 970; *People ex rel. Elkind v Rosenblum*, 184 Misc 916, 269 App Div 859, 295 NY 929; *Matter of College of City of N. Y. v Hylan*, 205 App Div 372; *Matter of New York City School Bds. Assn. v Board of Educ.*, 39 NY2d 111.) III. The court below erred in attempting to resolve social, political and educational controversies for which there may not be solutions, which cannot be resolved by reference to judicial standards and which are within the exclusive power of the people's elected representatives. (*Jones v Beame*, 45 NY2d 402; *James v Board of Educ.*, 42 NY2d 357; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440; *Matter of Catapano Co. v New York City Fin. Admin.*, 40 NY2d 1074; *Shapiro v City of New York*, 32 NY2d 96; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Lindsay v Wyman*, 372 F Supp 1360, affd *sub nom. Beame v Lavine*, 419 US 806; *Baker v Carr*, 369 US 186.)

Daniel P. Levitt, Edward H. Rosenthal and *Miriam R. Best* for respondents-appellants. I. The courts below correctly held that New York's school finance scheme violates the education article of the State Constitution. (*Donohue v Copiague Union Free School Dist.*, 47 NY2d 440; *Judd v Board of Educ.*, 278 NY 200, 712; *Matter of Viemeister v White*, 88 App Div 44, 179 NY 235; *People v Abrahams*, 40 NY2d 277.) II. The courts below correctly held that New York's school finance scheme violates the equal protection clause of the State Constitution. (*Matter of Levy*, 38 NY2d 653, app dsmd *sub nom. Levy v City of New York*, 429 US 805; *Shapiro v Thompson*, 394 US 618; *Loving v Virginia*, 388 US 1; *People ex rel. Wayburn v Schupf*, 39 NY2d 682; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Goss v Lopez*, 419 US 565; *Brown v Board of Educ.*, 347 US 483; *Lombardi v Nyquist*, 63 AD2d 1058; *Bukovsan v Board of Educ.*, 61 AD2d 685; *Marston v Lewis*, 410 US 679.) III. Because New York's school finance scheme does not rationally pursue legitimate objectives, it violates the equal protection clause of the Federal Constitution. IV. The courts below correctly held that plaintiffs' claims are justiciable and that plaintiffs have standing. (*People v Abrahams*, 40 NY2d 277; *Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d 731; *Jones v Beame*, 45 NY2d 402; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440; *James v Board of Educ.*, 42 NY2d 357; *Orr v Orr*, 440 US 268; *Board of Educ. v Allen*, 20 NY2d 109, 392 US 236.)

John Silard and *Adam Kaufman* for Rochester Board of Education; *Frederick A. O. Schwarz, Jr., New York City Corporation Counsel* (*Doron Gopstein* of counsel); *David M. Garber, Syracuse Corporation Counsel*, and *Joseph P. McNamara, Buffalo Corporation Counsel*, for intervenors-respondents-appellants. I. Under the present State funding system, the restricted school funding capacity of the cities, like that of the property-poor districts, creates inequality that violates the rights of city school children under the State Constitution. II. Constitutional guarantees are violated by the State aid formula's disequalizing mismeasurement of city districts' school funding capacities and needs. (*Royster Guano Co. v Virginia*, 253 US 412; *Railway Ex-*

press v New York, 336 US 106; *Reed v Reed*, 404 US 71; *Weber v Aetna Cas. & Sur. Co.*, 406 US 164; *James v Strange*, 407 US 128; *New Jersey Welfare Rights Organization v Cahill*, 411 US 619; *Vlandis v Kline*, 412 US 441; *United States Dept. of Agric. v Moreno*, 413 US 528; *United States Dept. of Agric. v Murray*, 413 US 508; *Weinberger v Wiesenfeld*, 420 US 636; *Levy v Parker*, 346 F Supp 897, 411 US 978.) III. Constitutional guarantees are violated by the inferior public education resources provided by the State school system to poverty children concentrated in the city schools. (*Harper v Virginia Bd. of Elections*, 383 US 663; *Shapiro v Thompson*, 394 US 618; *Memorial Hosp. v Maricopa County*, 415 US 250; *Boddie v Connecticut*, 401 US 371; *Bullock v Carter*, 405 US 134.) IV. Only judicial action can secure significant and feasible public education equality. (*Board of Educ. v Allen*, 20 NY2d 109, 392 US 236; *Boryszewski v Brydges*, 37 NY2d 361.)

Peter M. Fishbein, Michael D. Blechman, Daniel D. Chazin and *Michael Starr* for 85 public school districts, *amici curiae*. I. Whether New York's system of school financing violates the equal protection clause must be judged by the rational basis test. (*Matter of Levy*, 38 NY2d 653, app dsmd *sub nom. Levy v City of New York*, 429 US 805; *Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326; *Matter of Jesmer v Dundon*, 29 NY2d 5, 404 US 953; *Massachusetts Bd. of Retirement v Murgia*, 427 US 307; *Riley v County of Monroe*, 43 NY2d 144; *Montgomery v Daniels*, 38 NY2d 41; *Matter of Quinton A.*, 49 NY2d 328; *Carey v Brown*, 447 US 455; *Matter of Griffiths*, 413 US 717; *Shapiro v Thompson*, 394 US 618.) II. The heightened scrutiny test requires only that legislation bear a fair and substantial relationship to important interests. (*Kirchberg v Feenstra*, 450 US 455; *Califano v Westcott*, 443 US 76; *Caban v Mohammed*, 441 US 380; *Lalli v Lalli*, 439 US 259; *Nyquist v Mauclet*, 432 US 1; *Michael M. v Sonoma County Superior Ct.*, 450 US 464; *Mathews v Lucas*, 427 US 495.) III. New York's present education financing system meets both the rational basis and the heightened scrutiny standards. (*Lafayette Steel Corp. v City of Dearborn*, 360 F Supp 1127; *Dandridge v Williams*, 397 US 471.) IV. Unequally large aid for intervenor cities is not required by the equal

protection clause. (*Matter of Bernstein v Toia*, 43 NY2d 437.) V. New York's system of school financing does not violate the education article of the State Constitution. (*Judd v Board of Educ.*, 278 NY 200; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440.)

Joseph T. McLaughlin, William M. Kelly, Dennis P. Orr and *Daniel Levin* for the Public Education Association and others, *amici curiae*. I. This case presents a justiciable controversy. (*Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d 731; *Matter of Dudley v Kerwick*, 52 NY2d 542; *Matter of Anderson v Krupsak*, 40 NY2d 397; *Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1; *Powell v McCormack*, 395 US 486; *Matter of Schneider v Rockefeller*, 31 NY2d 420; *Baker v Carr*, 369 US 186; *Jones v Beame*, 45 NY2d 402.) II. The equal protection clause of the New York Constitution requires that the State's school finance scheme not foreclose equal public educational opportunities to similarly situated students across school districts within the State. (*Eisenstadt v Baird*, 405 US 438; *Matter of Abrams v Bronstein*, 33 NY2d 488; *Marshall v United States*, 414 US 417; *People v Acme Markets*, 37 NY2d 326; *Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326; *Craig v Boren*, 429 US 190; *Jimenez v Weinberger*, 417 US 628; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Brown v Board of Educ.*, 347 US 483.) III. The State's school financing scheme forecloses equal public educational opportunities to students located in urban areas in violation of the State Constitution by disregarding the four overburdens unique to urban school districts. IV. The courts below ordered an appropriate remedy. (*Matter of Andresen v Rice*, 277 NY 271; *Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d 731.) V. The State has advanced no convincing arguments for reversing the judgment below. (*Lue v English*, 44 NY2d 654; *Matter of Ray A. M.*, 37 NY2d 619; *Berenson v Town of New Castle*, 38 NY2d 102; *Matter of Golden v Planning Bd. of Town of Ramapo*, 30 NY2d 359, 409 US 1003; *Village of Belle Terre v Boraas*, 416 US 1; *Cooper v Morin*, 49 NY2d 69, cert den *sub nom. Lombard v Cooper*, 446 US 984; *Craig v Boren*, 429 US 190; *Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326;

Goldberg v Kelly, 397 US 254; *Brown v Board of Educ.*, 347 US 483.)

Jack Greenberg, *Steven L. Winter* and *Nancy A. Kilson* for the NAACP Legal Defense and Educational Fund, Inc.; *Jeffry H. Gallet* for the New York Metropolitan Council of the American Jewish Congress, and *Kevin Kearney* for the Department of Education, Diocese of Brooklyn, *amici curiae*. I. The school finance system deprives New York's minority children of equal protection of the laws. (*Brown v Board of Educ.*, 347 US 483; *Hobson v Hansen*, 269 F Supp 401, 393 US 801, affd *sub nom. Smuck v Hobson*, 408 F2d 175; *Brown v Board of Educ.*, 386 F Supp 110; *Matter of Skipwith*, 14 Misc 2d 325; *Natonabah v Board of Educ.*, 355 F Supp 716; *Matter of 303 West 42nd St. Corp. v Klein*, 46 NY2d 686; *Hart v Community School Bd. of Educ.*, 383 F Supp 699, 512 F2d 37; *Arthur v Nyquist*, 573 F2d 134, cert den *sub nom. Manch v Arthur*, 439 US 860; *Columbus Bd. of Educ. v Penick*, 443 US 449; *United States v Texas Educ. Agency*, 564 F2d 162, cert den *sub nom. Austin Independent School Dist. v United States*, 443 US 915.) II. This school finance system deprives minority children of the opportunities guaranteed by the education article. (*Judd v Board of Educ.*, 278 NY 200, 712; *Columbus Bd. of Educ. v Penick*, 443 US 449; *People ex rel. Cisco v School Bd. of Borough of Queens*, 161 NY 598; *People ex rel. Board of Educ. v Graves*, 243 NY 204; *Matter of Wiltwyck School for Boys v Hill*, 11 NY2d 182; *Matter of Levy*, 38 NY2d 653; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440.)

John F. Haggerty and *Michael R. Lanzarone* for Warren M. Anderson, *amicus curiae*. I. The language and history of the State equal protection clause and the decisions of this court call for use of the rational basis test in deciding the equal protection claim. (*Dorsey v Stuyvesant Town Corp.*, 299 NY 512; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Craig v Boren*, 429 US 190; *Reed v Reed*, 404 US 71; *Montgomery v Daniels*, 38 NY2d 41; *Matter of Levy*, 38 NY2d 653; *Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326.) II. There is no violation of the education clause of the State Constitution. (*McInnis v Shapiro*, 293 F Supp 327, affd *sub nom. McInnis v Ogilvie*, 394 US 322.)

OPINION OF THE COURT

JONES, J.

[1-3] The present amalgam of statutory prescriptions for State aid to local school districts for the maintenance and support of public elementary and secondary education does not violate the equal protection clause of either the Federal or the State Constitution nor is it unconstitutional under the education article of our State Constitution.

This declaratory judgment action challenging the State's provisions for financing our public schools is prosecuted by two groups, representing different constituencies and mounting attacks based on different predicates. The original plaintiffs by which the action was instituted in 1974 are the boards of education of 27 school districts located at various sites in the State and 12 students of public schools located in some of those districts. The intervenors, whose participation in the action was agreed to by the original parties, are the boards of education, officials, resident taxpayers, and students of the Cities of New York, Buffalo, Rochester and Syracuse, together with a federation of parent and parent-teacher associations in the City of New York. Defendants are the Commissioner of Education, the University of the State of New York, the State Comptroller and the Commissioner of Taxation and Finance of the State of New York.[1]

It is the contention of the original plaintiffs (who are "property-poor" school districts) that the system for financing public schools presently in effect in this State (as principally set forth in Education Law, § 2022 [provision for local district financing]; and § 3602 [apportionment of State aid]) by which funds raised by locally imposed taxes are augmented by allocations of State moneys in accordance with a variety of formulas and grants, violates the equal protection clauses of both the State and the Federal Constitutions and the education article of our State Consti-

1. Briefs *amici curiae* have been filed. In support of the contentions of the original plaintiffs and the intervenors: a brief for the Public Education Association, the Educational Priorities Panel, the New York Civil Liberties Union, and the City Club of New York, and a brief for the Council of Churches of the City of New York, the Department of Education of the Diocese of Brooklyn, the NAACP Legal Defense and Educational Fund, Inc., and the New York Metropolitan Council of the American Jewish Congress. In support of the position of defendants: a brief on behalf of 85 school districts within the State of New York and a brief for the majority leader in the State Senate.

tution because that system results in grossly disparate financial support (and thus grossly disparate educational opportunities) in the school districts of the State. The intervenors, representing interests in school districts located in four of the largest cities in the State, also assert violations of the same State and Federal constitutional provisions as the result of circumstances said to be peculiar to cities which they contend place them in a position comparable to that of property-poor districts. Included in these circumstances, they assert, are special financial burdens borne by cities in four categories: (1) demands on municipal budgets (from which local funds for education are secured) for noneducation needs peculiar to cities ("municipal overburden"), (2) diminished purchasing power of the municipal education dollar, (3) significantly greater student absenteeism (with a resulting adverse effect both because of added operational costs and because State aid is largely allocated on the basis of average daily attendance), and (4) larger concentrations in cities of pupils with special educational needs, all four of which may be comprehended within the term "metropolitan overburden". These factors are said to result in greatly disparate educational opportunities available to children in the cities' public schools when compared to the offerings of some of the school districts not located within cities.

Succinctly stated, it is the gravamen of the complaint of the original plaintiffs (and the findings of the courts below provide factual support for their argument) that property-rich districts have an ability to raise greater local tax revenue enabling them to provide enriched educational programs beyond the fiscal ability of the property-poor districts. The intervenors argue that although they are not disadvantaged in their ability to raise gross revenue from local sources, in consequence of the economic factors of metropolitan overburden the net effective economic ability of the city districts falls well below that of noncity districts (and the factual determinations made below support their argument). Both then assert that State aid as presently granted serves to perpetuate, and even to exacerbate, these disparities.

Both courts through which this litigation has progressed have granted declarations favorable to the original plaintiffs and to the intervenors, although not on all the claims asserted. Each court made careful and detailed factual determinations with respect to the financing of the State's educational system, the operation of the various State aid statutory provisions, and their practical impact on various school districts, individually and comparatively. In the case of the Appellate Division there was consideration not only of the public school finance system as it existed at the time the action was commenced in 1974 but also of the effect of alterations accomplished by legislation up to and through chapters 53 and 148 of the Laws of 1981. In reaching our disposition we proceed on these factual determinations made by both courts below as to the details of the various school district programs and operations and their comparison with one another, as well as the impact on them of the present State aid programs.

After an extended nonjury trial which produced 23,000 pages of transcript and 400 exhibits, the Justice presiding issued a judgment declaring that the State's public school finance system violates both the equal protection clause (art I, § 11) and the education article (art XI, § 1) of the State Constitution and, as to the cities whose interests are represented by the intervenors, the equal protection clause (14th Amdt, § 1) of the Federal Constitution as well. The Appellate Division, by a divided court, modified the judgment of the trial court; while concurring in the determination that the provisions of the State Constitution had been violated, the appellate court rejected the conclusion that the intervenors had also established a violation of the Federal Constitution. Justice HOPKINS, concurring in part and dissenting in part, rejected all claims of denial of equal protection, but concluded that the present "maze of convoluted intricacies and provisos" of State aid fails to constitute a "basic State-wide fiscal *system* for education" as required in his view by the education article of the State Constitution (83 AD2d 217, 267-268). We now modify the order of the Appellate Division and direct that judgment be entered declaring that the present admixture of statutory provisions for State aid to local school districts, considered

in connection with the existing system for local financing, is constitutional under the equal protection clause of the Federal Constitution and under both the equal protection clause and the education article of the State Constitution.

At the outset it is appropriate to comment briefly on the context in which the legal issues before us arise. Although New York State has long been acknowledged to be a leader in its provision of public elementary and secondary educational facilities and services, and notwithstanding that its per pupil expenditures for such purposes each year are very nearly the highest in the Nation,[2] it must be recognized that there are nonetheless significant inequalities in the availability of financial support for local school districts, ranging from minor discrepancies to major differences, resulting in significant unevenness in the educational opportunities offered.[3] These disparities may properly be ascribed in some respects to the wide variances between the property assessment bases on which local district taxes are imposed. Similarly, it may be accepted that the four major cities represented by the intervenors, by reason of the factors encompassed in metropolitan overburden, are forced to provide instructional services and facilities of a lesser quantity, variety, and quality than those provided in some other school districts. No claim is advanced in this case, however, by either the original plaintiffs or the intervenors that the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents; their attack is directed at the existing disparities in financial resources which lead to educational unevenness above that minimum standard.

The determination of the amounts, sources, and objectives of expenditures of public moneys for educational purposes, especially at the State level, presents issues of enormous practical and political complexity, and resolu-

2. For the year 1981-1982 there was expended $9.6 billion for public elementary and secondary education, $4 billion of State aid (the largest single item in the State budget) and $5.6 billion raised by local taxes.

3. We are assuming that there is a significant correlation between amounts of money expended and the quality and quantity of educational opportunity provided.

tion appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity. This is of the very essence of our governmental and political polity. It would normally be inappropriate, therefore, for the courts to intrude upon such decision-making (see *Matter of Board of Educ. v City of New York*, 41 NY2d 535, 538; *Matter of Anderson v Krupsak*, 40 NY2d 397, 402-403; *New York Public Interest Research Group v Steingut*, 40 NY2d 250, 257; cf. *James v Board of Educ.*, 42 NY2d 357). With full recognition and respect, however, for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches. That because of limited capabilities and competences the courts might encounter great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action on the part of the Legislature or the executive is neither to be ignored on the one hand nor on the other to dictate judicial abstention in every case. In the discharge of our judicial responsibility in this case, recognizing the existence of the very real disparities of financial support as found by the lower courts, we nonetheless conclude that such disparities do not establish that there has been a violation of either Federal or State Constitution.[4]

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4. Although worded in terms of a challenge to the State's system for financing public education including both financial support generated by real property taxation within the local district and that received from the State in the form of State aid, we interpret the assault to be primarily focused on asserted constitutional infirmities in the provisions for State aid. No argument is advanced, for instance, that the Legislature should realign local school district boundaries to assure property-equal districts or that some other revenue-generating means should be substituted for local district real property taxation. Indeed, we have some doubt as to the jurisprudential prudence (assuming that our court would have jurisdiction to do so) of issuing any blanket declaration of unconstitutionality as to the entire system for financing public education, composed as it is of a combination of local and State-wide factors, economic and political — if for no reason other than the great difficulty of fashioning practical remedies or of implementing any such declaration. (Cf. *Jones v Beame*, 45 NY2d 402, 406, 408-409; *Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992.) Challenges to the provisions

(n. cont'd)

[1] Considering first the claim that the existing provisions for State aid to finance public education in this State violate the equal protection clause contained in the Fourteenth Amendment of the United States Constitution, we agree with the Appellate Division that this claim must fail. The equal protection argument as developed by the original plaintiffs is that, because what are termed property-rich districts (those districts having a greater amount of assessable real property per pupil) are able to generate, through local taxation approved by taxpayers in those districts, a larger amount of money per pupil for education than is generated through the same process of local tax approval by property-poor districts (resulting in a lower per pupil expenditure in the latter districts), the financial resources (and thus education programs and facilities) of the two groups are significantly unequal. The intervenors assert that, in the case of large cities, although the property wealth per pupil is not low, inequality is nevertheless occasioned by metropolitan overburden which likewise operates to diminish the available financial resources (and thus per pupil expenditures) in those localities. The inequalities existing in property-poor and large city school districts, both argue, are perpetuated and magnified rather than remedied by the existing distribution of State funds allocated to education — apportioned as such funds are in accordance with a formula and variations thereof which supplement local school tax revenue only to the extent of assuring a minimum, uniform per pupil expenditure throughout the State, together with an additional flat grant for each pupil and "save harmless" or special aid provisions which are designed to compensate for inflationary increases in real property values and to ease the effect of decreasing pupil population.

The essence of the original plaintiffs' argument — that disparities in per pupil expenditures, resulting largely from differences in the value of assessable property per

made by the Legislature for appropriation and allocation of State aid to local school districts in the light of the present geographical boundaries of such districts fixed by legislative action and of legislative authorization for local district real property taxation, do present justiciable issues which call for judicial resolution.

pupil among school districts, coupled with a failure by the State to offset such disparities by provision of compensating aid funds, constitute an impermissible discrimination against pupils in the less property-wealthy districts in violation of the Fourteenth Amendment — was considered and rejected by the Supreme Court of the United States in *San Antonio School Dist. v Rodriguez* (411 US 1). Noting that the subject of public school finance involves decisions both with respect to the raising and disposition of public revenues and of persistent, complex, and difficult questions of educational policy areas appropriately within legislative determination — the court held that rational basis, rather than strict scrutiny, was the proper standard against which to examine the Texas public school financing system there under review (which was described by the court as "comparable to the systems employed in virtually every other State" [at pp 47-48]). Applying this standard, the court found in the Texas system a rational relationship to a legitimate State purpose — the permission and encouragement of participation in and control of public schools at the local district level (at p 49). As both courts below acknowledged, the conclusions reached in that case dictate a similar result in the present litigation insofar as the original plaintiffs' claim of a Federal Constitution violation is concerned.

With respect to the intervenors' position in this litigation, not *in haec verba* put before or considerd by the Supreme Court in *San Antonio*, that metropolitan overburden is an unequalizing force which must be remedied by compensating increases in State aid to city school districts, a response is found in the opinion by Justice HOPKINS at the Appellate Division, which observes that the cited inequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction. While unquestionably education faces competition in the contest for municipal dollars from other forms of public service for which nonmunicipal school districts bear no responsibility, municipal dollars flow into the cities' treasuries from sources other than simply real property taxes — sources similarly not available to nonmunicipal

school districts. The disbursement of the funds received from real estate taxes and such other sources and the decisions as to how they shall be allocated are decisions to be made by municipal governmental bodies. In the words of Justice HOPKINS: "It is beyond the power of this court in this litigation to determine whether the appropriations of the intervenor-plaintiffs have been wisely directed or reasonably applied, or whether their budgets are fairly divided in terms of priority of need between the competing services, such as police, fire, health, housing and transportation, and it is, equally, beyond the power of the court to determine whether the resources of the intervenor-plaintiffs can otherwise be employed so that their educational needs can be met." (83 AD2d 217, 262.) Accordingly, we conclude that, applying the rational basis test, the intervenors have failed to demonstrate denial of equal protection under the Federal Constitution.

[2] We turn then to the claims of both original plaintiffs and intervenors that, whatever may be determined with respect to the equal protection clause of the Federal Constitution, a violation of the comparable provision of our State Constitution (art I, § 11) has been demonstrated — the conclusion reached by both courts below. Our attention must first be directed to identification of the standard appropriate to the subject now before us (financial support for public education) for examination as to whether there has been a violation of our constitutional mandate of equal protection (*Montgomery v Daniels*, 38 NY2d 41, 59). The Appellate Division, declining to apply the measurement of strict scrutiny that had been employed by the trial court and under which the trial court had found the education finance system invalid, concluded that the intermediate or more careful scrutiny test described in *Alevy v Downstate Med. Center of State of N. Y.* (39 NY2d 326) was properly to be employed — justifying this decision by its conclusion that the right to education in this State "represents an important constitutional interest". (83 AD2d, at p 241.) The choice of that intermediate standard, under which the appellate court also found the system invalid, cannot be

sustained however, both for the previously recited reasons articulated in the *San Antonio* case and in face of our decision in *Matter of Levy* (38 NY2d 653, app dsmd *sub nom. Levy v City of New York*, 429 US 805, reh den 429 US 966). In *Levy* we expressly held that rational basis was the proper standard for review when the challenged State action implicated the right to free, public education. Nothing in the present litigation impels a departure from that decision, made as it was with full recognition of the existence in our State Constitution of the education article (art XI).

The circumstance that public education is unquestionably high on the list of priorities of governmental concern and responsibility, involving the expenditures of enormous sums of State and local revenue, enlisting the most active attention of our citizenry and of our Legislature, and manifested by express articulation in our State Constitution, does not automatically entitle it to classification as a "fundamental constitutional right" triggering a higher standard of judicial review for purposes of equal protection analysis. Thus, in *Matter of Bernstein v Toia* (43 NY2d 437), where the concern was public assistance to the needy — clearly a matter of significant interest, provision for which is similarly included in our State Constitution[5] (art XVII, § 1) — we employed the rational basis test as the proper standard for review. The more careful scrutiny standard has been applied when the challenged State action has resulted in intentional discrimination against a

5. The inclusion in our State Constitution of a declaration of the Legislature's obligation to maintain and support an educational system is not to be accorded the same significance for purposes of equal protection analysis as would a counterpart reference to education in the Federal Constitution. The two documents are drafted from discretely different constitutional perspectives. The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people (US Const, 10th Amdt). Great significance accordingly is properly attached to rights guaranteed and interests protected by express provision of the Federal Constitution. By contrast, because it is not required that our State Constitution contain a complete declaration of all powers and authority of the State, the references which do appear touch on subjects and concerns with less attention to any hierarchy of values, and the document concededly contains references to matters which could as well have been left to statutory articulation (e.g., provision for superintendence and repair of canals, art XV, § 3, scarcely to be classified a fundamental constitutional right on any view).

class of persons grouped together by reason of personal characteristics, the use of which called into question the propriety of the particular classifications (*People v Whidden*, 51 NY2d 457 [gender]; *Matter of Fay*, 44 NY2d 137, app dsmd *sub nom. Buck v Hunter*, 439 US 1059 [illegitimacy]; *Matter of Lalli*, 43 NY2d 65, affd *sub nom. Lalli v Lalli*, 439 US 259 [illegitimacy]). The *Alevy* case itself was one in which race was the factor which pervaded the reverse discrimination alleged by the petitioner.

No classification of persons is present in the case now before us, in which the claimed unequal treatment is among school districts resulting from disparity as to revenue available for educational purposes in consequence of unequal tax bases or unequal demands on local revenue. The claim is of discrimination between property-poor and property-wealthy school districts. No authority is cited to us, however, that discrimination between units of local government calls for other than rational basis scrutiny.

Our inquiry is therefore only whether there has been demonstrated the absence of a rational basis for the present school financing system, premised as it is on local taxation within individual school districts with supplemental State aid allocated in accordance with legislatively approved formulas and plans. Addressing the submissions of the original plaintiffs, our conclusion is that there has not been such a showing, and that the justification offered by the State — the preservation and promotion of local control of education — is both a legitimate State interest and one to which the present financing system is reasonably related.

Under the existing system the State is divided into more than 700 local school districts, each of which varies from the others and, from time to time, varies within itself, in greater or lesser degree, as to number of pupils and value of assessable real property, as well as with respect to numerous other characteristics, including personal wealth of its taxpayers. Outside the cities in the State (in which school funding is a part of the total municipal fiscal process), funds for the support of the education program offered in the schools of a district are raised through the imposition of local taxes following voter authorization

based on approval of a budget prepared and submitted by an elected board of education, reflecting the instructional program (within standards fixed by the State) perceived by the local board of education to be responsive to the needs and desires of the community. By way of assuring that a basic education will be provided and that a uniform, minimum expenditure per pupil will occur in each district, the Legislature has long provided for payment of supplementing State aid such that presently $1,885 per pupil (and, by a weighting computation, larger amounts for particular types of pupils) is available for education in each district. Throughout the State, voters, by their action on school budgets, exercise a substantial control over the educational opportunities made available in their districts; to the extent that an authorized budget requires expenditures in excess of State aid, which will be funded by local taxes, there is a direct correlation between the system of local school financing and implementation of the desires of the taxpayer.

It is the willingness of the taxpayers of many districts to pay for and to provide enriched educational services and facilities beyond what the basic per pupil expenditure figures will permit that creates differentials in services and facilities. Justification for a system which allows for such willingness was recognized by the Supreme Court of the United States in *San Antonio School Dist. v Rodriguez* (411 US 1, 48, n 102, *supra*) quoting with approval a statement which accompanied the State of Hawaii's 1968 amendment of its educational finance statute to permit counties to collect funds locally and spend them on their schools over and above the wholly State-funded program: "Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government." (Hawaii Sess Laws, 1968, act 38, § 1.) Any legislative attempt to make

uniform and undeviating the educational opportunities offered by the several hundred local school districts — whether by providing that revenue for local education shall come exclusively from State sources to be distributed on a uniform per pupil basis, by prohibiting expenditure by local districts of any sums in excess of a legislatively fixed per pupil expenditure, or by requiring every district to match the per pupil expenditure of the highest spending district by means of local taxation or by means of State aid (surely an economically unrealistic hypothesis) — would inevitably work the demise of the local control of education available to students in individual districts. The *amicus* brief filed on behalf of the 85 school districts puts it well: "For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools. Through the years, the people of this State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend."

The State-wide $360-per-pupil flat grant provided by State aid legislation is immune from attack under the equal protection clause, for on its face there is no inequality in this per pupil distribution of State aid which is allocated to all school districts without differentiation. Nor does the fact that the "save harmless" or special aid grants accrue to the benefit of only those districts which stand to suffer identified harm by reason of changing property values or of diminishing pupil registration serve to invalidate the school financing system. In addition to the fact that only a minimal amount of State aid is distributed under this category, we cannot say that there is no rational basis for the Legislature's selection of districts subject to these impacts as those for whom alleviating relief is appropriate and for its provision for such relief so long as the

relief is uniformly available to school districts falling within the classifications.

As to the intervenors, their contentions that they are denied equal protection under the State Constitution must be rejected for the same reasons that their comparable claims under the Federal Constitution are rejected (*supra*, at pp 41-42).

Finally, we consider the claim, upheld by all the Judges below, that the present school financing system violates the education article (art XI, § 1) of our State Constitution. It is there required that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

[3] It is significant that this constitutional language — adopted in 1894 at a time when there were more than 11,000 local school districts in the State, with varying amounts of property wealth offering disparate educational opportunities — makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district. Nor is there any provision either that districts choosing to provide opportunities beyond those that other districts might elect or be able to offer be foreclosed from doing so, or that local control of education, to the extent that a more extensive program were locally desired and provided, be abolished. What appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State. Nothing in the contemporaneous documentary evidence compels the conclusion that what was intended was a system assuring that all educational facilities and services would be equal throughout the State.[6] The enactment

6. (1894 NY Constitutional Convention Documents, Doc No. 62.) Reports by State School Superintendents and Messages by Governors to the Legislature before and after the Constitutional Convention of 1894 with recommendations relative to legislative enactments with respect to the State's educational system, while informative, are

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mandated only that the Legislature provide for maintenance and support of a system of free schools in order that an education might be available to all the State's children.[7] There is, of course, a system of free schools in the State of New York. The Legislature has made prescriptions (or in some instances provided means by which prescriptions may be made) with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters. If what is made available by this system (which is what is to be maintained and supported) may properly be said to constitute an education, the constitutional mandate is satisfied.

Interpreting the term education, as we do, to connote a sound basic education, we have no difficulty in determining that the constitutional requirement is being met in this State, in which it is said without contradiction that the average per pupil expenditure exceeds that in all other States but two. There can be no dispute that New York has long been regarded as a leader in free public education. Because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy —

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nevertheless irrelevant to an interpretation of the language of the constitutional enactment (e.g., 1877 NY Assem Doc No. 11; 1889 NY Assem Doc No. 7; 1894 NY Assem Doc No. 42; 1895 NY Assem Doc No. 34; 1897 NY Assem Doc No. 71; 1898 NY Assem Doc No. 64; 5 Lincoln, Messages from the Governors, p 852; 9 Lincoln, pp 15-16, 549). What was then, and what over the years since, has been urged on the Legislature as sound educational policy is to be clearly distinguished from the command laid on the Legislature by the Constitution.

7. We observe that in the constitutional prescription the connotation of "system" is attached to education — "a system of free common schools" — not to maintenance and support. Thus, once it is concluded that there is an educational system in New York State which comports with the constitutional requirement, it is immaterial that the Legislature in its wisdom has seen fit to provide financial support under complex formulas with a variety of components, even were it to be concluded that the maze of financial support measures was not entitled itself to be characterized as a "system".

something not shown to exist in consequence of the present school financing system.[8]

For the reasons stated,[9] the order of the Appellate Division should be modified, without costs, to direct that the judgment of Supreme Court be modified by substituting for

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8. Decisions in other jurisdictions upholding existing State school financing systems against claims of violation of equal protection clauses or education provisions of State Constitutions or both include the following (the educational requirement of the State Constitution, when considered, is quoted with the citation): *Lujan v Colorado State Bd of Educ.* (__ P2d __, __ Col __ [decided May 24, 1982] ["a thorough and uniform system of free schools"]); *McDaniel v Thomas* (248 Ga 632 ["an adequate education for the citizens of Georgia"]); *Board of Educ. v Walter* (58 Ohio St 2d 368, cert den 444 US 1015 ["a thorough and efficient system of common schools"]); *Olsen v State ex rel. Johnson* (276 Ore 9 ["a uniform, and general system of Common schools"]); *Thompson v Engelking* (96 Idaho 793 ["a general, uniform and thorough system of public, free common schools"]); *State ex rel. Woodahl v Straub* (520 P2d 776 [Mont]); *Shofstall v Hollins* (110 Ariz 88 ["a general and uniform public school system"]).

Among those cases sustaining one or both of such challenges are *Washakie County School Dist. No. 1 v Herschler* (606 P2d 310 [Wyo] [denial of equal protection]); *Horton v Meskill* (172 Conn 615 [denial of equal protection and violation of constitutional article, "free public elementary and secondary schools"]); *Serrano v Priest* (5 Cal 3d 584 [denial of equal protection]); *Robinson v Cahill* (62 NJ 473, cert den *sub nom. Dickey v Robinson*, 414 US 976 [denial of equal protection and violation of constitutional article, "a thorough and efficient system of free public schools"]).

9. The dissent illustrates the very great, and perhaps understandable, temptation to yield to a result-oriented resolution of this litigation. Universal acceptance of the central role of education in our society today is unquestioned.

The dissenter, however, misapprehends the issue before us on this appeal. It is not whether education is of primary rank in our heirarchy of societal values; all recognize and support the principle that it is. It is not whether there are great and disabling and handicapping disparities in educational opportunities across our State, centered particularly in our metropolitan areas; many recognize and decry this state of affairs. The ultimate issue before us is a disciplined perception of the proper role of the courts in the resolution of our State's educational problems, and to that end, more specifically, judicial discernment of the reach of the mandates of our State Constitution in this regard. The expostulation of the dissenter, and the urgings of those who would alleviate the existing disparities of educational opportunity, are properly to be addressed to the Legislature for its consideration and weighing in the discharge of its obligation to provide for the maintenance and support of our State's educational system. Primary responsibility for the provision of fair and equitable educational opportunity within the financial capabilities of our State's taxpayers unquestionably rests with that branch of our government.

As we wrote in *Montgomery v Daniels* (38 NY2d 41, 53, *supra*): "It is not our office to rejoice or to lament. A fair regard for the basic polity of separation of powers dictates judicial respect for the proper role of the legislative branch, and pride in the uniquely and essentially neutral role of the judicial branch. That judicial role is both a privilege and a limitation." It would neither serve the purposes of orderly government nor honor the role of the judiciary to lay aside standards of judicial review recently held appropriate (in decisions in which the dissenter joined) because in this instance corrective measures may, in the view of many, be much needed with respect to the provision of financial support for our educational system.

the declarations that the State's school financing system violates the equal protection clause and the education article of the State Constitution a declaration that the present statutory provisions for allocation of State aid to local school districts for the maintenance and support of elementary and secondary public education are not violative of either Federal or State Constitution.

FUCHSBERG, J. (dissenting). I believe the sad record of this case demonstrates that in material manner the public school system of New York State, to which falls responsibility for the education of well over three million children, does not rise to the level dictated by a realistic reading of the State constitutional mandate for the "*maintenance* and *support* of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1 [emphasis added]).

Justice L. KINGSLEY SMITH of the State Supreme Court, after presiding over the 122-day trial at which this matter was exhaustively explored, found that it failed to do so (94 Misc 2d 466). Justice LEON D. LAZER, writing on this point in a painstaking and penetrating opinion for the Appellate Division, came to the same conclusion (83 AD2d 217, 219). Concurring in this view, Justices JAMES D. HOPKINS and MOSES M. WEINSTEIN each emphasized his position by writing separately to this effect. Nor did the recent Report and Recommendations of the distinguished official New York State Special Task Force on Equity and Excellence in Education, whose independent inquiry was precipitated by the findings in this case, arrive at a different appraisal. And Governor Hugh L. Carey's Elementary and Secondary School Message, delivered to the current session of the Legislature on February 17, 1982, was in the same vein.

In this connection, it is worthy of special note, in a world where life and law must not live in separate compartments, that the Governor, responding to the decrees of the afore-mentioned courts, and quoting the Task Force's statement that "in the education of children, the demands of morality are as compelling as the commands of legality", recommended a five-year program to "make equal education opportunity a reality".

But the majority of this court, though compelled to accept the now affirmed "careful and detailed factual determinations *** made by both courts below", insists that "the constitutional requirement is being met in this State". Doing so, it also rejects the lower courts' conclusion that the disparities and discriminations produced by our property-oriented educational finance system offends the equal protection guaranteed by our State Constitution (art I, § 11).[1] For the reasons which follow, my disagreement is on all counts.

At the very outset of my analysis, I put at issue the majority's assertion (majority opn, at p 43, n 5) that the inclusion of the education article in our State Constitution, far from carrying the weight of a like insertion in the Federal Constitution, where it has no counterpart, may have little more significance than would a mere "statutory articulation". I would think that a far more likely theory, consistent with our Federal form of Government, is that primary concern for education was to be that of the States rather than of the Union and that the article's placement in the State Constitution was all the more crucial in the context of the pluralistic political process of which the Tenth Amendment speaks (US Const, 10th Amdt).

In any meaningful ordering of priorities, it is in the impact education makes on the minds, characters and capabilities of our young citizens that we must find the answer to many seemingly insoluble societal problems. In the long run, nothing may be more important — and therefore more fundamental — to the future of our country. Can it be gainsaid that, without education there is no exit from the ghetto, no solution to unemployment, no cutting down on crime, no dissipation of intergroup tension, no mastery of the age of the computer? Horace Mann put it pragmatically that education is not only "the great equalizer of men", but, by alleviating poverty and its societal costs, more than pays for itself. So, too, only this past week, the Supreme Court of the United States reminded us that

1. Justice SMITH held that the equal protection clauses of both the Federal and State Constitutions were implicated as to the intervenor cities. The Appellate Division, however, for its equal protection rationale, relied on the State Constitution alone.

it had recognized the public school "as the primary vehicle for transmitting the values on which our society rests" (*Plyler v Doe*, __ US __ [NY Times, June 16, 1982]).

Even more pointed is how the sponsors of the education article perceived it. The spokesman for the unanimous Education Committee of the Constitutional Convention which immediately preceded the one at which the article was adopted, reported it in these words: "If there is any thing that should be constitutionalized because of its great importance, it is the all-important, overriding interest of education. Sir, I regard it as being paramount to every other interest in this State. I regard this article as being more important to the people of the State, to every man, woman and child in the State, than any other article that has been under consideration in this Convention" (1867-1868 NY Constitutional Convention, 4 Proceedings & Debates, p 2856).[2]

Though an unrelated political controversy foreclosed *any* amendment of the State Constitution that year, when it next was amended, in 1894, the article as we know it today was adopted on a report which apparently had not retreated a bit from the position that "[t]here seems to be no principle upon which the people of this commonwealth are so united and agreed as this, that the first great duty of the State is to protect and foster its educational interests" (1894 NY Constitutional Convention, Doc No. 62, p 3). The report went on to note (at p 4), "that within the last half century of constitutional revision no other State of the Union has considered it superfluous or unwise to make such an affirmation in its fundamental law" and that the article "requires not simply schools, but a system; not merely that they shall be common, but free, and not only that they shall be numerous, but that they shall be sufficient in number, so that all the children of the State may, unless otherwise provided for, receive in them their education. No desire to confine the new Constitution to the

2. Then Governor Fenton too told the delegates, "Our people have acted upon the theory that the extension to every class and condition of society, of the means of early education, and facilities for the acquisition of knowledge in after life, contributes to the prevention of crime, the preservation of the social order, the security and stability of the government, and the thrift and prosperity of all who are engaged in the various departments of industry".

narrowest possible limits of space should prevent the adoption of an enactment declaring in the strongest possible terms the interest of the State in its common schools".[3]

It is in juxtaposition to this contemporary commentary by the fathers of our education article, which, revealingly, came to be known as "the children's Bill of Rights" (2 Lincoln, Constitutional History of New York, p 206), that a sampling of the facts regarding the actual impact of the system as it now exists should be examined. For this purpose, we may well quote from the Appellate Division's excellent synopses, first, as to the four intervenor cities (Syracuse, Rochester, Buffalo and New York City) and, second, as to the many individual districts who initiated this suit.

The plight of the cities, found to be attributable to the inexorable drain of a municipal overburden[4] left unremedied by a State aid formula tied to realty resources, is at once seen in the findings that they:

"spent 28% of their tax revenues on education while jurisdictions outside the cities spent 45% * * * [and that the] huge concentration of poverty stricken gave New York City 47% of the State's pupils with special educational needs, although it had only 31% of the total public school population and received only 26% of the State's education operating aid. * * * [Trendwise], [b]y 1980-1981 New York City's percentage of the State's special needs pupils had risen to 51% as against 33% of the public school enrollment and 29% of education operating aid.

* * *

3. The education clause, more matter-of-factly, but still tracking this more amplified language, reads: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1).

4. Municipal overburden is a condition in which "'[s]ome areas, particularly urban areas, have exceptionally high non-educational expenses * * * [so that] revenues raised by property taxes which might otherwise be used for education, must be diverted to non-educational purposes'" (*Robinson v Cahill*, 69 NJ 449, 466, n 5). In the present case, the cities suffer from "high concentrations of the poor and elderly, large numbers of public assistance and public health recipients, high unemployment and low educational attainment, high crime rates, professional rather than volunteer fire departments, costly correctional facilities, mass transit problems, higher park and recreation expenses, subsidization of public housing, higher construction costs for new schools, deterioration of infrastructure, plus a myriad of other noneducational costs mandated by State law in connection with city employees * * *. The severity of the problems is illuminated by the fact that, with 43% of the State's population, New York City had 70% of the State's

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[Furthermore], "[t]he State's reliance on attendance rather than enrollment figures results in a double financial penalty to the cities because of their high rates of absenteeism. * * * Because the high absentee rate is a direct consequence of poverty and underlying social conditions, its effects are inexorable and its financial effects cannot be alleviated by employment of additional attendance officers.

"The significantly higher proportion of physically, mentally and emotionally handicapped and learning impaired pupils resident in the cities and the extra personnel required to administer necessary programs compel the expenditure of greater sums to educate them. While the State aid formula provides additional weightings for handicapped students, the computation is flawed by a failure to account for municipal overburden, reduced purchasing power of city educational dollars, and high absentee rates.

* * *

"Reduced aid to the cities also impairs their abilities to instruct students who speak little or no English, although such programs are required under Federal mandate. * * * [Also] the cities have the highest concentration of occupational education students * * *. Because of their large numbers and the greater expense of the programs offered, city school districts are unable to accommodate all students requesting occupational education.

* * *

[Indicative of both inferiority and inequality], "results of national, State and local achievement tests demonstrate that unconscionable numbers of children fail to acquire basic educational skills. In Rochester, standardized tests given in 1975 revealed that 45% of the secondary school students were 'educationally disadvantaged' — that is, not performing at grade level and at least two years or more

public assistance recipients, who constituted 12½% of its residents as compared to 3.6% in the rest of the State. The city had 67% of the State's Medicaid claimants and spent $51 per capita in contrast to $15 in the rest of the State" (83 AD2d, at pp 229-230). Ironically, though intended to redress the rural and property poor gap, the simplistically conceived "equalization" formulae are the cause of a perverse disequalization effect on education in the presumably property rich cities.

below level in reading — as were 58% of those students in mathematics; 16% of Rochester's twelfth grade students read fifth grade level or below. In a 1976 New York City test, 12% of the ninth grade students were found to read at fourth grade level or below. *** These percentages translate into many thousands of high school children, some of whom are totally illiterate while others can read the words without accompanying comprehension and still others cannot apply the meager information they can obtain to problems." (83 AD2d, at pp 229-232).

The Trial Judge's summary is apt: "When the cities concentrate resources on pupils with special needs, other pupils, including those who are in fact disadvantaged but not reached by special programs, are subjected to educational deprivation *** Many pupils attend classes in buildings which were shown to be in need of repairs and lacking in facilities for counseling, study or recreation. Pupils attending schools in the large cities were shown to be provided with less physical security in their schools; less transportation; restricted sports and extracurricular activity; inadequate library and health services and diminished offerings in art and music. In summary, the failure to provide State aid on an equitable basis deprived the children in the large city districts of an equal education opportunity" (94 Misc 2d, at pp 518-519).

Now, as to the nonintervening plaintiffs, while their problems may not be compounded by municipal overburden, they suffer from a qualitatively, if not, quantitatively related malaise produced by a daunting and difficult finance system so onerous in its effect on districts poor in realty wealth (see 83 AD2d 217, esp at pp 223-226) and so complex in its application that Justice JAMES D. HOPKINS, concurring in the majority's finding that the State is violating the State Constitution's education article, felt called upon to complain that "the design of a uniform and harmonious system conceived by its nineteenth century authors had been frustrated and distorted" into "a veritable jungle of labyrinthine incongruity", "an Ossa of confusion piled on a Pelion of disorder". (83 AD2d, at p 269.) In everyday terms, the net result is illuminated again by the Appellate Division's recitation, this time that:

"The disparities in operating expenditures per pupil in 1974-1975 ranged from $4,215 for the richest district to $936 for the poorest, a ratio of 4.5 to 1 * * * Three districts in Suffolk spent more than $6,300 and four spent less than $2,300 while the ratios between some districts in Nassau and Albany Counties reached 2 to 1. The direct connection between wealth and operating expenses and total expenses is revealed by further statistics, a few of which bear mention here.

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"The consequences of [such] disparities are dramatic. * * * To achieve expenditure levels to provide better educational output, low-wealth districts must tax themselves at relatively high rates, as a result of which they encounter difficulties in obtaining school budget approvals, imposition of austerity budgets which limit transportation, supplies, library and textbook purchases, and, ultimately, rises in rates of mortgage foreclosure and community instability. [See, e.g., *Matter of Onteora Cent. School Dist. (Onteora Non-Teaching Employees Assn.)*, 56 NY2d 769.]

* * *

"Low-wealth districts are unable to reduce class size and their children lose the resulting individual attention which is particularly important for both the disadvantaged and the gifted. Such districts are compelled to hire fewer non-teaching personnel as guidance counselors, psychologists and therapists and they cannot adequately provide the special attention requisite for students with severe speech and hearing impediments. Poor districts must ration their speech therapists and other ancillary services to such a degree that long waiting lists exist for these services. Also constrained by insufficient realty wealth are the offer of the number and variety of advanced placement programs (which encourage children to continue in school and provide better preparation for college) * * * Finally, the low-wealth districts experience chronic shortages of equipment and supplies.

* * *

"Fund shortages also affect district ability to engage necessary teaching and administrative personnel. At the time of trial, 9 of Brentwood's 12 elementary schools were without assistant principals and the district was unable to follow the Education Department's recommendation for reducing class size in certain courses because it could not afford to hire the requisite additional staff. In Roosevelt, there were no funds for substitute teachers and 23 professional staff members had to be terminated in 1975-1976 to eliminate a budget deficit." (83 AD2d, at pp 227-229.)

Surely, if it were meet to substitute the minimized reading the majority would give the education article for the hope and promise with which the constitutional delegates wrote it, it could not be said as a matter of law that the picture painted by this proof of disparities and discriminations complied with even the undefined "minimal acceptable facilities and services" or the broadly stated "sound basic education" to which it would be thus reduced. The fact is, of course, that in this past century as high school and college statistics show, the acceptable level of education in our country has risen, not fallen.

Responsively, the constitutional demands of our State's education article, must be deemed to have kept pace. For, while, as a practical matter, the Federal Constitution may be said to fix a floor for the rights of our people, the ceiling may be set by each State's own constitutional charter (see, generally, my dissent in *Matter of Esler v Walters*, 56 NY2d 306, 315).[5] And, as great expounders of constitutional law, from MARSHALL to HOLMES, have always made clear, such a document's permanence rests on its adaptability to changing events (Jackson, Struggle for Judicial Supremacy, p 174).

This brings me to the unequal protection phase of this case for, as I see it, whether taken separately or in their combined effect, the guarantees of the two converging constitutional provisions here at stake preclude the unequal and inadequate public schooling which children in property poor or fiscally overburdened areas of this State must endure.

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5. As Judge JON. O. NEWMAN of the United States Court of Appeals recently put it at a symposium bearing the descriptive title, "The Rediscovery of the Connecticut Consti-

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On this score, suffice it to say that I am in agreement with the Appellate Division's determination that, for reasons included among those on which I have already touched, the standard of scrutiny to be brought to bear on this case was the intermediate one heretofore recognized in this State (see *Matter of Fay*, 44 NY2d 137, app dsmd *sub nom. Buck v Hunter*, 439 US 1059; *Matter of Lalli*, 43 NY2d 65, affd *sub nom. Lalli v Lalli*, 439 US 259; *Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326; Gunther, Supreme Court 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv L Rev 1, 28, 35, 44-47).[6]

It then proceeded along an analytical path which included recognition (1) that equality of educational opportunity is an important State constitutional interest in New York (see, also, *Plyler v Doe*, __ US __, *supra; Brown v Board of Educ.*, 347 US 483, 489), (2) that the extensive invidious disparities in the availability of this opportunity are born of the classifications based on property or fiscal wealth of the districts in which the affected children reside, (3) that preservation of local controls, the consideration the State (and now the majority here) offers for imposing the statutory plan, is so confined by what a limited local tax base will permit that its vaunted furtherance of local independence is illusory rather than real, and (4) that by

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tution: Broadening Protections for Individual Rights", "Within the grand design of the 'old federalism' there is room for a little chemistry to be practiced by state court judges construing the fundamental legal document of their state — the state constitution. Perhaps the discipline is more akin to alchemy, for it seems very likely that the leaden language of many state constitutional provisions is waiting to be turned into the pure gold of vital protections of individual rights".

6. *Matter of Levy* (38 NY2d 653), in which I joined, is to be distinguished from the present case. *Levy* involved no more than a dispute of very limited dimension in the course of which there was raised an issue over the rationality of a provision for "relieving the parents of blind and deaf children from any financial responsibility in connection with their children's education while at the same time requiring parents whose children are otherwise handicapped to contribute to the maintenance component of educational expenses" (*supra*, at p 658). Largely on historical grounds, in the main because the plight of the blind and deaf became a societal concern before those otherwise handicapped, the court found a rational basis for the differentiation and declined to require a broadening of the maintenance program. In sharp contrast, what plaintiffs here — including a mass of disadvantaged children — primarily seek is nondiscriminatory distribution of the moneys the State already makes available. As already indicated, that it is most appropriate, and indeed urgent, for the courts to grant this relief by enforcing our Constitution has been the view of every New York Judge who has had occasion to pass on this case up to this point.

no means had the State shown that the local input it could achieve could not be created by less intrusive means. On these bases, it was decided, correctly I say, that the intermediate standard was an effective bar to the statutory scheme.

Finally, two related equal protection questions may be worthy of comment.

The first of these is that it is not to be assumed that the equal protection clause of the Federal Constitution was not also impinged. Although the Appellate Division, as an intermediate tribunal, thought it best to avoid the question, *San Antonio School Dist. v Rodriguez* (411 US 1) may leave more leeway than some believe. In *Rodriguez*, there was no claim that the statute malapportioned State school aid by mismeasuring the funding capacities and needs of city districts. Rather, the Supreme Court there expressly stated its concern lest the problems of the "overburdened core-city school districts" in that case be exacerbated rather than eased by recognition of the theory pressed by their plaintiffs.

The second bears on the analysis provisionally suggested in Justice WEINSTEIN'S concurring opinion — that strict scrutiny may have been an appropriate test. This formulation was premised largely on the undisputed fact that the existing education aid formulae have an adverse effect, not only on pupils from impoverished families, but also on a large percentage of the nearly 750,000 "minority" students (black, Hispanic, American Indian, Asian and others). About 110,000 are unable to participate in school effectively in English and many are illiterate in their native tongues as well.

Raised, therefore, was the spectre of an issue of discrimination involving the approximately 83% of the "minority" people who reside in the intervenor cities. Its occasion would be the inability of these cities, left bereft of the means to do so, to cope with the social and educational breakdown affecting a large group identifiable by race, country of origin or alienage. This issue, of course, is made far less tenuous, if that it ever was, by last week's Federal equal protection decision in *Plyler v Doe* (*supra*). Be that as

it may, however, since Justice WEINSTEIN decided to adopt the alternative of joining in the majority's rationale, which in this case would have achieved the same result, suffice it unto the day that the question needs no answer now.

In fine, poor children, no less than rich, and the Nation of which both are a part, are entitled to an education that prepares today's students to face the world of today and tomorrow. Those who took and tolled the testimony tell us that, by any standard that counts, for the multitudinous many no such educational opportunity truly exists. Understandably, then, as the Governor put it to the Legislature just the other month, "Financial inequalities in education are more pronounced than at any time in the State's history" and "There can be no disagreement that New York's school finance program must be reformed". Because, nevertheless, as the record reveals, our present method of financing education grossly distorts our ability to do so, and because I agree with the Appellate Division that it is constitutionally defective, my vote is to uphold the order of that court.

Chief Judge COOKE and Judges JASEN, GABRIELLI, WACHTLER and MEYER concur with Judge JONES; Judge FUCHSBERG dissents and votes to affirm in a separate opinion.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

Opinion of the Appellate Division, Second Department, dated October 26, 1981

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT et al., Respondents-Appellants, and BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER et al., Intervenors-Respondents, v EWALD B. NYQUIST, as Commissioner of Education, et al., Appellants-Respondents.

Second Department, October 26, 1981

SUMMARY

APPEAL from so much of a judgment of the Supreme Court (L. KINGSLEY SMITH, J.), entered January 3, 1979 in Nassau County, as declared that the State's system for financing public elementary and secondary schools violates the equal protection clause and the education article of the New York Constitution (art I, § 11; art XI, § 1) as to plaintiffs and intervenor-plaintiffs, and the equal protection clause of the Federal Constitution (14th Amdt, § 1) as to intervenor-plaintiffs, and CROSS APPEAL from so much of the judgment as failed to declare that the challenged legislation violates the Federal equal protection clause as to plaintiffs. The appeal brings up for review so much of an order of the same court, entered April 22, 1976, as denied defendants' motion for summary judgment.

Board of Educ. v Nyquist, 94 Misc 2d 466, modified.

HEADNOTES

Constitutional Law — Standing — Justiciability

1. Plaintiffs, various boards of education throughout the State of New York, have standing to challenge the State's current method for allocating resources to meet the constitutional mandate that it provide for "the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1) in a suit wherein they assert that said present financing method violates the equal protection clauses of the State and Federal Constitutions (NY Const, art I, § 11; US Const, 14th Amdt, § 1), and, in view of the expanding scope of standing, plaintiffs school children, represented by their parents, have similar standing; moreover, the controversy is susceptible of judicial resolution and, accordingly, the merits of plaintiffs' claims of constitutional infringement are properly reached by the court, which need not reorder fiscal priorities or interject itself into the day-to-day administration of the school system or educational policies to entertain the action.

Constitutional Law — Equal Protection of Laws — Public School Finance System

2. New York's current public school finance system, whereunder the quality of the educational opportunity offered by any particular local school district is largely determined by the amount of taxable property in the district, violates the equal protection clause of the New York State Constitution (art I, § 11); the State has failed to meet its

burden, under the "intermediate" or "heightened" level of State constitutional scrutiny, of demonstrating that the system, which presently impinges upon the important constitutional right of an education guaranteed to all of the children of this State by section 1 of article XI of the New York Constitution, furthers the asserted State interest of preserving local control over education in these districts, and it has also failed to show that the objective advanced by the classification cannot be achieved by a less intrusive method of financing the public school system.

Constitutional Law — Equal Protection of Laws — Public School Finance System

3. New York's current public school finance system, whereunder the quality of educational opportunity offered by any particular local school district is largely determined by the amount of taxable property in the district, does not violate the Fourteenth Amendment of the United States Constitution; education is not a fundamental right under the Federal Constitution and, even assuming that some identifiable quantum of education is a constitutionally protected requisite of the exercise of the First Amendment or electoral franchise rights, both of which the Constitution does guarantee, evidence that under the existing system certain children have not been provided an education which meets basic minimum standards and evidence of a significant variation in educational opportunities provided by local districts, does not demonstrate that New York has deprived its young people of First Amendment rights and electoral franchise rights to such an extent that the Fourteenth Amendment is violated.

Constitutional Law — Equal Protection — Public School Finance System

4. New York's current public school finance system, which creates vast variances among local school districts in the State in the quality of education provided to the children within those districts, violates the imperative of section 1 of article XI of the New York State Constitution that the State maintain and support a system of free common schools "wherein all the children of this state may be educated", since said method of financing fails to establish a school system capable of providing an education for many educable children; a mandate that the State of New York maintain a system to provide an education for the children of the State which is "thorough and efficient" or "ample" is implicit in the unembellished language of the education article.

APPEARANCES OF COUNSEL

Robert Abrams, Attorney-General (Shirley Adelson Siegel, Amy Juviler, Rosalind S. Fink, Robert L. Schonfeld, Clement H. Berne and *Evelyn Tenenbaum* of counsel), for appellants-respondents.

Kramer, Lowenstein, Nessen, Kamin & Soll (Daniel P. Levitt and *Alan Jay Stein* of counsel), for respondents-appellants.

John Silard, Joseph L. Rauh, Jr., Elliott C. Lichtman and *Mary M. Levy (Rauh, Silard & Lichtman)* for intervenors-respondents. *(Adam Kaufman* for Rochester Board of Education; *Allen G. Schwartz, New York City Corporation Counsel [James G. Greilsheimer* and *Doron Gopstein]* of counsel; *David M. Garber, Syracuse Corporation Counsel;* and *Joseph P. McNamara, Buffalo Corporation Counsel).*

Shearman & Sterling (Wayne D. Collins, William M. Kelly and *Dennis P. Orr* of counsel), for Public Education Association and others, *amici curiae*.

OPINION OF THE COURT

LAZER, J.

The educational command of New York's Constitution is simple and direct: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated."[1] That simple sentence comprises the essential constitutional underpinning for a multifaceted fiscal and administrative structure encompassing a central authority, more than 700 school districts, and over 4,000 schools in which some 200,000 professionals conduct the education of 3,000,000 of the State's children. Twenty-seven of the school districts, four of the five largest cities in the State, and a number of school children and their parents have joined in challenging the statutory scheme under which the public educational system receives its fiscal support. Basing its conclusions on detailed findings of fact, the trial court (94 Misc 2d 466) has declared the public school finance system violative of the equal protection clauses of the State and Federal Constitutions and the education article of the State Constitution. Although we depart from a portion of the rationale for the trial court's opinion and disagree with its determination of the Federal question, we concur with the ultimate conclusion — New York's method of financing public education is constitutionally defective.

I

This litigation symptomizes the continuing struggle between dual forces: the desire of society's members to have educational opportunity for all children and the desire of individual families to provide the best education they can afford for their own children.[2] The struggle has been spurred to its current stage of intensity by two sociodemographic events — the post-World War II population explosion with its attendant out-migration from city to suburb

1. NY Const, art XI, § 1.

2. Foreword by Professor James S. Coleman to Coons, Clune & Sugarman, Private Wealth and Public Education, p vii.

and the in-migration of the poor and disadvantaged to the cities.[3] With the decline of the cities and the emergence of wide variances in suburban community wealth, disparities in the quality of education based upon real estate wealth have spawned widespread dissatisfaction with property-oriented educational finance systems. While the ensuing litigation first focused on the Federal Constitution, subsequent judicial events have transformed the critical question — the existence of a constitutional requirement for equal educational opportunity — to one of State constitutional interpretation.

Early in the recent decade — which witnessed school finance litigation in nearly two thirds of the States[4] — the California Supreme Court concluded that differences in educational quality based on the wealth of a child's parents or neighbors undermined core principles of representative government and violated guarantees of equal protection of the law (see *Serrano v Priest*, 5 Cal 3d 584 [1972; *Serrano v Priest* (I)]). The post-*Serrano* wave of educational finance reform[5] was quickly stifled, however, when the United States Supreme Court found school district wealth not a suspect classification, education not a fundamental right and the equal protection mandate of the Fourteenth Amendment not contravened by the Texas method of financing education (see *San Antonio School Dist. v Rodriguez*, 411 US 1 [1973]). Although two of our neighbor States subsequently determined that their educational finance systems did not meet the mandates of their State Constitutions (see *Robinson v Cahill*, 62 NJ 473 [1973], cert den *sub nom. Dickey v Robinson*, 414 US 976; *Horton v Meskill*, 172 Conn 615 [1977]), and California took the same path (see *Serrano v Priest* [II], 18 Cal 3d 728 [1976]), the pall of *Rodriguez* continues to overcast all educational finance jurisprudence.

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3. Thomas, Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment, 48 U of Cin L Rev 255.

4. Levin, Current Trends in School Finance Reform Litigation: A Commentary, 1977 Duke L J 1099. Legal attacks on school finance systems commenced in the late 1960's. See *McInnis v Shapiro*, 293 F Supp 327, aff'd *sub nom. McInnis v Ogilvie*, 394 US 322; *Burruss v Wilkerson*, 310 F Supp 572, affd [illegible] US 44.

5. Grubb, The First Round of Legislative Reforms in the Post-*Serrano* World, 38 Law and Contemporary Problems 459.

This State's litigation commenced in June of 1974 when the Board of Education of the Levittown Union Free School District joined with the boards of 26 other districts and 12 elementary and high school students to seek judgment declaring the method of financing the State's public education system unconstitutional. The Boards of Education of four of the five largest cities in the State — New York City, Buffalo, Rochester and Syracuse — plus 12 city school children subsequently served a separate complaint as intervenor-plaintiffs. The defendants are the Commissioners of Education and of Taxation and Finance of the State of New York, the State Comptroller, and the University of the State.

Both groups of plaintiffs claim that New York's method of financing public education violates the State[6] and Federal equal protection clauses and section 1 of article XI of the State Constitution.[7] The original plaintiffs contend that the quality of education actually delivered by the State depends upon the degree of real estate wealth within the respective school districts. With most educational revenue deriving from local real property taxes, the same rate of taxation produces gross disparities in per pupil tax yield between districts rich and poor in realty wealth, depriving the poor of the ability to match the rich in per pupil expenditures and quality of educational services even if they tax at higher rates than do the rich. Since State aid formulas are inadequate and often counterproductive in their equalization aspects, low-wealth districts cannot furnish what is obtainable elsewhere — smaller class size, more experienced and effective teachers, low student/teacher ratios, broader curricula, extensive extracurricular activities, more modern equipment and special programs for both the disadvantaged and the specially gifted. New York thus denies plaintiffs the educational resources available to wealthy districts and compels the offer of inferior education in contravention of the equal protection clauses of the State and Federal Constitutions.

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6. The first sentence of section 11 of article I of the New York Constitution declares: "No person shall be denied the equal protection of the laws of this State or any subdivision thereof."

7. "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated."

The statutory scheme is also attacked as violative of the education article of the State Constitution, which the original plaintiffs view as envisioning a single State-wide school system instead of more than 700 distinct systems under which students, who may be equivalent except for district of residence, do not receive equivalent educational advantages. In selecting a financial structure which permits the existence of such gross disparities, New York has failed to fulfill its duty to provide a "system" where "all the children" of the State may be educated.

The intervenor cities argue that despite their real property resources they are so fiscally incapacitated by "municipal overburden", labor market differences and needs differentials as to be the least capable of relying on locally raised revenues to finance education. The overburden results from the necessity to devote such high proportions of the municipal tax base to noneducational services as to deprive education of its rightful due. Furthermore, the State's equalizing devices bear no fair and substantial relationship to equalization of capacity because they measure capacity by per pupil property wealth, and the special statutes designed to assist districts with pupils requiring compensatory school services provide less per pupil aid to the urban districts which have the highest concentration of such children.

In response, the defendants first challenge the justiciability of the issues and the plaintiffs' standing to maintain the action. On the merits, they assert that the State Constitution requires only that the State guarantee sufficient funds to ensure a basic minimum education for all its children, and that the constitutional requirement has been met by the current education system; that the legislative scheme for financing education is a rational one designed to preserve local control over education; and that the numerous components for distributing State aid under the formulas are rational exercises of legislative judgment. Finally, the defendants contest the intervenors' assertions that inexorable municipal and educational overburdens require compensatory adjustments in the aid formulas to reflect these urban realities.

After a trial spanning 122 days, 23,000 pages of transcript and involving the testimony of 128 witnesses and the admission of 400 exhibits, Trial Term rendered 487 findings of fact and, in a remarkable opinion *(Board of Educ. v Nyquist,* 94 Misc 2d 466, *supra),* concluded that New York's school finance system violated the equal protection and education clauses of the State Constitution and, in the case of the intervenors, the Federal equal protection clause as well. Nonetheless, the court found that the use of local school districts and reliance on local taxation was consonant with the Federal and State Constitutions and, while retaining jurisdiction, permitted the existing school finance system to continue until requisite changes were made or an injunction issued. In their appeals, the defendants seek reversal, and the original plaintiffs seek an additional declaration that the financing system is violative of the Federal equal protection clause as to them.

II

Trial Term's requisite focus was upon the finance system as it existed in 1974, including the State aid formula enacted that year (see L 1974, chs 53, 718), but that prescription has been further altered since the trial (see L 1978, chs 53, 74, 593; L 1979, chs 53, 288; L 1980, chs 53, 352, 678; L 1981, chs 53, 148). Since it is our obligation to decide these appeals based on the law as it exists at the time of appellate decision *(Fruhling v Amalgamated Housing Corp.,* 9 NY2d 541, app dsmd 368 US 70; *Strauss v University of State of N. Y.,* 2 NY2d 464, app dsmd 355 US 394, reh den 355 US 968; *Black Riv. Regulating Dist. v Adirondack League Club,* 307 NY 475; *United States v Schooner Peggy,* 1 Cranch [5 US] 103), we have been compelled to evaluate the legislation which has intervened since the trial court rendered its decision. As a consequence — and despite the delays inherent in the process — we have solicited the parties' views as to the effects of the legislative changes and their suggestions for further findings of fact. On the basis of our scrutiny of the trial record, and analysis of the more recent statutes and various State Education Department computer runs which the parties have by stipulation made part of the record, we are modifying some of the trial court's findings and inserting a

number of entirely new ones. Nevertheless, in affirming the great majority of Trial Term's findings, we are convinced that the intervening statutory alterations have worked no substantial change in the substance of the conditions found by that court. If those conditions sufficed to render the educational finance structure constitutionally deficient, legislative amendments have not cured the malady. We briefly summarize here some of the essential factual conclusions we have reached.[8]

The State's educational funding sources are composed of local taxes, State appropriations and Federal aid. Independent school districts possess the power to tax real property while cities with populations that exceed 125,000 have a range of revenue raising measures, including real property taxes, with which to defray all municipal expenses, including education. Fifty-five per cent of educational funds originate locally, 40% comes from the State, and the balance derives from Federal sources.

In 1925, the Legislature initiated the "foundation grant" system of providing aid to education — a method which underwent numerous modifications in the decades that followed.[9] The 1974 formula in effect at the time of trial entitled each school district to obtain State assistance in raising a support figure of $1,200 per aidable pupil unit by levying a hypothetical 15 mill tax upon the full value of its real property tax base. This formulation was altered by a "two-tier" arrangement adopted in 1978 (L 1978, ch 74, § 5) and further modified in 1980 (L 1980, ch 53) and 1981 (L 1981, ch 53). The first tier of the current prescription

8. The detailed findings which provide the comprehensive basis for our factual conclusions, have been approved by the court and constitute an appendix to this opinion.

9. New York's foundation grant system originated in the Cole-Rice Law of 1925 (L 1925, ch 675) following the Strayer and Haig report of 1923 (Strayer & Haig, The Financing of Education in the State of New York, 1923). After the report of the Diefendorf Committee in 1962 (see NY Legis Doc, 1962, No. 10), the foundation grant program was abandoned in favor of a "shared-cost" program, which quickly deteriorated to another system of dispensing foundation grants because of the low expenditure ceilings set by the Legislature (see Coons, Clune & Sugarman, *op. cit.*, at pp 182-188). In 1972, The Fleischmann Report on the Quality, Cost and Financing of Elementary and Secondary Education in New York concluded that the existing system was hopeless and recommended full State assumption of fiscal costs. The report was followed by the impanelment in 1973 of a Task Force on State Aid for Elementary and Secondary Schools, whose proposals resulted in further amendments to the State aid system (see L 1974, chs 241, 718). The determination of unconstitutionality under review here was followed by the creation of the New York State Special Task Force on Equity and Excellence in Education which has rendered two interim reports.

entitles each district to raise $1,650 per weighted pupil by imposition of an 11.57 mill tax on its full tax base with the State compensating for any deficiency. The second tier is keyed to the adjusted gross income (for income tax purposes) behind each pupil unit in the district. Under it a district with adjusted gross income of less than 125% of the State average of $29,700 will receive assistance to a theoretical maximum of $235 per pupil unit if the income is zero.[10] Although the 1981 legislation which related second tier assistance to personal wealth invoked a concept new to educational finance in New York, its total effect on the inequities in the system is insignificant due either to the height of income at which the formula commences its assistive function or the limited sums involved at the second tier level. Indeed, the 1981 adjustments to the operating aid formulas will result in plaintiff Levittown receiving an increase in operating aid of less than $29,000, or .21% more than it received in 1980-1981; a far wealthier district — Great Neck — fares better, however, receiving $24,000 more — a .71% increase over its previous year's aid. Whatever the tendency of the support figures in both tiers to equalize fiscal capacities of school districts, however, it has been partially offset by the statutory entitlement of every district to a flat grant of $360 per aidable pupil regardless of wealth.

Both the 1974 and 1981 formulas have further disequalizing aspects. School districts with diminishing pupil counts or sharp increases in property wealth can avoid unpleasant consequences to their State aid allotments by resorting to a "total save harmless" prescription which

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10. The current formula for computing first tier operating aid is:

$$OA_1 = \$1,650 \left(1 - .51 \frac{\text{district valuation total wealth pupil units}}{\$72,700}\right)$$

Thus, for the district of average wealth as of 1981 (that is, one in which district valuation total wealth pupil units equals $72,700) State aid under the first tier is $1,650 (1-[.51 × 1]) = $808.50 (Education Law, § 3602, subd 1, par i [as amd by L 1981, ch 53, § 11], subd 3, par b [as added by L 1981, ch 53, § 17], subd 12, par b [as amd by L 1981, ch 53, § 24]).

The current formula for computing second tier operating aid is:

$$OA_2 = \$235 \left(1 - .80 \frac{\text{district adjusted gross income}}{\$29,700}\right)$$

Thus, the district which has an adjusted gross income equal to the State average as of 1981 (i.e., $29,700) received $47 per pupil unit ($235 [1-(.80 × 1)] = $47) (Education Law, § 3602, subd 1, par k [as added by L 1981, ch 53, § 13], subd 3, par c [as added by L 1981, ch 53, § 17], subd 12, par c [as amd by L 1981, ch 53, § 25]).

allows them to receive the same total State aid as in the prior year or — since 1980 — to receive "special aid" which gives them the same State assistance per pupil as was received in the prior year provided the increase does not exceed 8% per pupil or the total amount received in the previous year. The school districts which calculate State aid under these provisions receive assistance which maintains their parity with the past without accounting for their currently lessened needs. Approximately one third of the districts now utilize these formulas and some have had continuous resort to such save harmless methods of calculating assistance since 1965.

While additional State aid is provided for buildings, transportation, Boards of Cooperative Educational Services (BOCES) and various other programs, the formulas employed in computing transportation and BOCES aid are more beneficial to property rich districts than to those of low wealth. Indeed, one of the two alternative computations available in the BOCES formula provides a wealthy, high-spending district with recoupment of almost the same percentage of its approved expenses as a poor district.

The record demonstrates that the ability to expend sums for educational purposes and the quality of the educational services delivered are directly correlated with local real property wealth. In 1975, that wealth ranged from $412,370 per pupil on a weighted average daily attendance basis to $8,884 — a ratio of 46 to 1. When the extremes were eliminated, the variation at the ninetieth and the tenth percentiles of wealth was about 4 to 1. The existence of grossly unequal access to wealth within the same counties was evidenced by the more than $124,000 of value per pupil in the Nassau districts of Manhasset, North Shore and Great Neck as compared to $30,000 to $37,400 in Levittown, Roosevelt and North Merrick. Three Suffolk districts possessed per pupil wealth in excess of $370,000, while three of the less endowed had less than $27,000. By 1981, the same three highest Nassau County districts ranged from $197,000 to $176,000 in per pupil wealth while the same lowest ranged from $42,000 to $63,000; in Suffolk County, the three richest districts had per pupil wealth in excess of $432,000 while the three poorest had

less than $38,000. Trial evidence established that the number of children affected by wealth differentials was substantial. In 1974-1975 only 18% of the State's pupils resided in school districts whose real property wealth fell within 10% of the State average of $49,000 and more than half of the State's pupils lived in districts whose real property wealth was 25% above or below the State average.

The disparities in operating expenditures per pupil in 1974-1975 ranged from $4,215 for the richest district to $936 for the poorest, a ratio of 4.5 to 1. The district at the ninetieth percentile spent $2,051 per pupil compared to $1,089 spent at the tenth percentile, a ratio in excess of 1.9 to 1. Three districts in Suffolk spent more than $6,300 and four spent less than $2,300 while the ratios between some districts in Nassau and Albany Counties reached 2 to 1. The direct connection between wealth and operating expenses and total expenses is revealed by further statistics, a few of which bear mention here. For the 1975-1976 year, the 44 districts with less than $15,000 value per pupil spent an average of $1,789 while the 21 wealthiest districts (with $120,001 to $300,000 full value) averaged $3,744 per pupil. In 1977-1978, operating expenditures per pupil at the second decile of real estate wealth ($37,982) were $1,571 per pupil while in the ninth decile ($86,756) the per pupil expenditure was $2,203.

The consequences of these disparities are dramatic. Districts with full value of under $20,000 per pupil raised on the average only $276 per pupil while those with more than $60,000 raised $1,743. To achieve expenditure levels to provide better educational output, low-wealth districts must tax themselves at relatively high rates, as a result of which they encounter difficulties in obtaining school budget approvals, imposition of austerity budgets which limit transportation, supplies, library and textbook purchases, and, ultimately, rises in rates of mortgage foreclosure and community instability. With professional staff ratios one of the most important indicators of quality in educational programs, higher wealth districts have a higher ratio of professional staff to students and smaller class sizes; one study revealed a 40% greater density of classroom teachers

per 1,000 pupils in high-spending districts. Not only are the teachers employed by the wealthier school districts more numerous on a per classroom basis, but they generally possess superior experience and training. Low-wealth districts are unable to reduce class size and their children lose the resulting individual attention which is particularly important for both the disadvantaged and the gifted. Such districts are compelled to hire fewer nonteaching personnel as guidance counselors, psychologists and therapists and they cannot adequately provide the special attention requisite for students with severe speech and hearing impediments. Poor districts must ration their speech therapists and other ancillary services to such a degree that long waiting lists exist for these services. Also constrained by insufficient realty wealth are the offer of the number and variety of advanced placement programs (which encourage children to continue in school and provide better preparation for college), advanced courses in the sciences, adequate variety in language courses, programs in the arts and sufficient field trips, all of which are available to wealthier districts, often without greater tax effort. Finally, the low-wealth districts experience chronic shortages of equipment and supplies.

In property-poor districts, budgetary constraints limit local ability to provide desired educational output and minimize freedom of choice. The record reveals that low-wealth districts have little leeway in developing curricula beyond what is required as a State minimum. In Levittown, advanced mathematics, language courses and certain mechanical arts courses were discontinued, basic curriculum courses were reduced, industrial arts programs could not be offered, foreign language programs in junior high school could not be re-established, and conversational foreign language courses could not be introduced in its elementary schools — all as a consequence of lack of funds. In the Roosevelt school district, as in many others, extracurricula programs requiring stipends, such as interscholastic sports and honor societies, were eliminated.

Fund shortages also affect district ability to engage necessary teaching and administrative personnel. At the time of trial, 9 of Brentwood's 12 elementary schools were

without assistant principals and the district was unable to follow the Education Department's recommendation for reducing class size in certain courses because it could not afford to hire the requisite additional staff. In Roosevelt, there were no funds for substitute teachers and 23 professional staff members had to be terminated in 1975-1976 to eliminate a budget deficit. In Burnt Hills — Balston Lake, budget cuts mandated a staff reduction of 25.9 positions, 14.9 of which were occupied by professionals.

III

At the root of the intervenors' fiscal problems is municipal overburden — the inexorable drain on the tax base caused by the need to deliver more numerous and more costly noneducational services. The condition is unremedied by the State aid formula which ties reduced average daily attendance to realty resources and thereby overstates the cities' true ability to finance education. Burdened with higher expenditures for noneducation purposes than the surrounding counties and the rest of the State, the consequences to the cities are obvious — the four intervenors spent 28% of their tax revenues on education while jurisdictions outside the cities spent 45%, and on a per capita basis, with Federal and State aid netted out, New York City's nonschool spending was $401.06 while in the rest of the State the figure was $183.17.

The conditions which create municipal overburden include those to which the decline of central cities are customarily attributed, and we conclude they are inexorable. The intervenors are burdened with high concentrations of the poor and elderly, large numbers of public assistance and public health recipients, high unemployment and low educational attainment, high crime rates, professional rather than volunteer fire departments, costly correctional facilities, mass transit problems, higher park and recreation expenses, subsidization of public housing, higher construction costs for new schools, deterioration of infrastructure, plus a myriad of other noneducational costs mandated by State law in connection with city employees, such as the "heart bill", which was extended by the 1981 Legislature (L 1981, ch 381, § 6).

The severity of the problems is illuminated by the fact that, with 43% of the State's population, New York City had 70% of the State's public assistance recipients, who constituted 12½% of its residents as compared to 3.6% in the rest of the State. The city had 67% of the State's Medicaid claimants and spent $51 per capita in contrast to $15 in the rest of the State. The costs of public assistance and Medicaid are largely beyond local control because they are governed by State and national criteria.

Its huge concentration of poverty stricken gave New York City 47% of the State's pupils with special educational needs, although it had only 31% of the total public school population and received only 26% of the State's education operating aid. Despite changes in the aid prescriptions which have occurred since the trial, disproportionately low State aid to the cities continues. By 1980-1981 New York City's percentage of the State's special needs pupils had risen to 51% as against 33% of the public school enrollment and 29% of education operating aid. Apart from Buffalo, the intervenors still receive fewer tax dollars in State aid per pupil unit than does the average school district.

Another disequalizing assumption of the State-wide scheme is uniformity of the purchasing power of the education dollar. State mandated minimum education programs cost 47% more and average expenses were 29% higher in down-State and metropolitan areas than in up-State areas, matters further exacerbated by the higher cost of living in the large urban centers. The largest component of school expense — teacher salaries — were higher down-State and approximately 30% higher in urban areas than in the rest of the State.

The State's reliance on attendance rather than enrollment figures results in a double financial penalty to the cities because of their high rates of absenteeism. The State aid formula first calculates fiscal capability by dividing total real property valuation by total wealth pupil units, a number based upon average daily attendance, and at a subsequent point determines the aggregate aid by utilizing "total aidable pupil units" which is again predicated upon average daily attendance in the district. Since the average

daily attendance in the cities is lower by far than in the rest of the State, the formula artificially inflates the real property value behind each pupil. In 1974-1975, the average daily attendance of students in the city schools was 84% in contrast to almost 94% elsewhere in the State. With planning based on total enrollment and the concomitant need to render additional assistance to pupils who have fallen behind due to absence, the high number of absentees increases education costs in the cities while at the same time depriving them of needed succor. Because the high absentee rate is a direct consequence of poverty and underlying social conditions, its effects are inexorable and its financial effects cannot be alleviated by employment of additional attendance officers.

The significantly higher proportion of physically, mentally and emotionally handicapped and learning impaired pupils resident in the cities and the extra personnel required to administer necessary programs compel the expenditure of greater sums to educate them. While the State aid formula provides additional weightings for handicapped students, the computation is flawed by a failure to account for municipal overburden, reduced purchasing power of city educational dollars, and high absentee rates. The record shows that the formula deprived the intervenors of some $26,000,000 in State aid in 1974-1975.

Those who require special programs 60% or more of each school day exist in substantially higher numbers in the intervenors' schools than elsewhere. Reduced aid to the cities also impairs their abilities to instruct students who speak little or no English, although such programs are required under Federal mandate. While the 1980 formula grants additional weighting for disadvantaged pupils and certain categories of the handicapped in secondary schools, the failure to apply such weighting to all handicapped students in secondary schools denied the intervenors some $12,000,000 aid for the 1980-1981 year.

Finally, the cities have the highest concentration of occupational education students, but the "Special Services aid" formula which assists with occupation education is less favorable than the BOCES computation available elsewhere. Had the BOCES formula been available to the

intervenor cities in 1975, they would have received over $15,000,000 in additional aid, more than $12,000,000 additional for the 1980-1981 year, and $5.7 million more for 1981-1982. Because of their large numbers and the greater expense of the programs offered, city school districts are unable to accommodate all students requesting occupational education.

The 1981 amendment which tied the second tier of basic aid to adjusted gross income within the districts further discriminated against the cities because their income generally exceeds the State-wide average despite the huge masses of poverty stricken who reside within their boundaries. As a result, New York City — with 33% of the State's pupils — is entitled to only 27% of second tier aid, and despite unquestioned enrichment of the handicapped aid prescriptions to assist the cities in 1981, New York City still will receive total aid in the area of 29% of the State's total while supplying one third of the pupil body and while still afflicted with the problems we have surveyed.

The results of national, State and local achievement tests demonstrate that unconscionable numbers of children fail to acquire basic educational skills. In Rochester, standardized tests given in 1975 revealed that 45% of the secondary school students were "educationally disadvantaged" — that is, not performing at grade level and at least two years or more below level in reading — as were 58% of those students in mathematics; 16% of Rochester's twelfth grade students read fifth grade level or below. In a 1976 New York City test, 12% of the ninth grade students were found to read at fourth grade level or below. Of these, 7% scored at a third grade level or below, and 4% scored at a second grade level or below. Other cities have similarly depressing levels of underachieving pupils. In one New York City school, 70% of the ninth graders tested were two or more years below grade level and one fourth were at fourth grade level or below. These percentages translate into many thousands of high school children, some of whom are totally illiterate while others can read the words without accompanying comprehension and still others cannot apply the meager information they can obtain to problems. In both reading and mathematics in all grades, the four

cities have far larger percentages of students in the bottom of three stanines of the Pupil Evaluation Program. We have been directed to no sources which would suggest any significant improvement in these dismal statistics in recent years.

The gross educational underachievement evidenced by these and other findings is compounded as the child progresses through school because the sequential format of the curriculum builds upon skills assumed to have been acquired earlier. Despite this phenomenon, however, educational experts testified that underachievement or failure could be ameliorated or overcome entirely by the implementation of various remedial programs, some of which had been conducted in their cities. Such programs can be implemented only at a substantial cost, and the reduced aggregate State aid precludes the cities from establishing the programs for all those who would benefit from them, and in fact, results in curtailment of existing programs. Trial Term's summary of the situation is apt: "When the cities concentrate resources on pupils with special needs, other pupils, including those who are in fact disadvantaged but not reached by special programs, are subjected to educational deprivation. As concerns educational offerings the city schools have been shown to have among the highest teacher-pupil ratios in the State and a severely constricted variety of elective courses. Many pupils attend classes in buildings which were shown to be in need of repairs and lacking in facilities for counseling, study or recreation. Pupils attending schools in the large cities were shown to be provided with less physical security in their schools; less transportation; restricted sports and extracurricular activity; inadequate library and health services and diminished offerings in art and music. In summary, the failure to provide State aid on an equitable basis deprived the children in the large city districts of an equal education opportunity." (*Board of Educ. v Nyquist*, 94 Misc 2d 466, 518-519, *supra.*)

IV

[1] Two of defendants' threshold contentions — both fastening upon aspects of justiciability (see *Jones v Beame*,

45 NY2d 402; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6) — merit summary dispatch. The various boards of education have standing to make the current challenge (see *Board of Educ. v Allen*, 20 NY2d 109, affd 392 US 236), and, in view of the "expanding scope of standing" (*Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 345), the school children represented by their parents have similar status (see *Boryszewski v Brydges*, 37 NY2d 361).

Nor is there substance to the second assault upon justiciability. Averring that the controversy is unsusceptible of judicial resolution, the defendants proclaim that adjudication of issues relative to the fiscal structure of the educational system will usurp legislative functions. But the court need not reorder fiscal priorities (see *Jones v Beame, supra*) or interject itself into the day-to-day administration of the school system or educational policy (see *James v Board of Educ.*, 42 NY2d 357) to entertain this action. The question here is whether the State's chosen method for allocating resources to meet the constitutional imperative of educating children comports with the Federal and State Constitutions. We know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs' claims of constitutional infringement an abdication of our constitutional duties. We turn, then, to the merits of the action.

V

Equal protection doctrine has two major concerns: the nature of the discrimination, that is, the division of people into classes for the purpose of differential application of the law, and the nature of the benefits or burdens involved.[11] The first step in analysis of a claim of deprivation of equal protection is selection of the measure of scrutiny to be applied. The traditional choice is between two alternatives — a "strict scrutiny" which is "usually fatal" in effect,[12]

11. Levin, The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament, 39 Md L Rev 187.

12. Gunther, The Supreme Court 1971 Term- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv L Rev 1, 8. Writing in 1973, one commentator noted that since 1944 no classification to which strict scrutiny had been applied survived (see Richards, Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication, 41 U of Chi L Rev 32).

and "rational basis" review which has been characterized as "deferential"[13] and "toothless"[14] and under which the challenged classification generally survives.

Strict scrutiny is the test when the challenge involves suspect classifications such as race,[15] national origin[16] and alienage,[17] or classifications which impinge upon a "fundamental interest" such as voting,[18] travel,[19] procreation,[20] criminal appeals,[21] or First Amendment rights.[22] When the court invokes strict scrutiny review, the government must prove the exactitude of the relationship between the means chosen and the legislative end to be served[23] and establish that the end is justified by a "compelling state interest".[24] But where the classification is not suspect and no fundamental interest has been infringed, rational basis review is required; those who challenge the legislation must show that the classification had no rational relationship to a legitimate legislative end *(Vance v Bradley*, 440 US 93; *Village of Belle Terre v Boraas*, 416 US 1; *Dandridge v Williams*, 397 US 471). Since they rarely succeed, it is obvious that under the "two-tier" approach the litigation is almost always determined by the method of review selected. In *San Antonio School Dist. v Rodriguez* (411 US 1, *supra)*, the Supreme Court found wealth nonsuspect, education nonfundamental, and chose rational basis as the test. The Texas educational finance scheme survived.

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13. *Craig v Boren*, 429 US 190, 210-211, n * (POWELL, J., concurring).

14. See *Trimble v Gordon*, 430 US 762, 767; *Matter of Lalli*, 43 NY2d 65, 67, affd *sub nom. Lalli v Lalli*, 439 US 259.

15. *Loving v Virginia*, 388 US 1; *McLaughlin v Florida*, 379 US 184; *Korematsu v United States*, 323 US 214.

16. *Castaneda v Partida*, 430 US 482; *Hernandez v Texas*, 347 US 475; cf. *Takahashi v Fish & Game Comm.*, 334 US 410.

17. *Nyquist v Mauclet*, 432 US 1; *Examining Bd. v Flores de Otero*, 426 US 572; *Sugarman v Dougall*, 413 US 634; *Matter of Griffiths*, 413 US 717; *Graham v Richardson*, 403 US 365; cf. *Ambach v Norwick*, 441 US 68; *Foley v Connelie*, 435 US 291.

18. *Dunn v Blumstein*, 405 US 330; *Kramer v Union School Dist.*, 395 US 621; *Harper v Virginia Bd. of Elections*, 383 US 663; *Reynolds v Sims*, 377 US 533.

19. *Memorial Hosp. v Maricopa County*, 415 US 250; *Dunn v Blumstein*, 405 US 330; *Shapiro v Thompson*, 394 US 618.

20. *Skinner v Oklahoma*, 316 US 535.

21. *Griffin v Illinois*, 351 US 12.

22. *Carey v Brown*, 447 US 455; *Police Dept. of Chicago v Mosley*, 408 US 92.

23. See, e.g., *Carey v Brown*, *supra*; *Police Dept. of Chicago v Mosley*, *supra*.

24. *Matter of Griffiths*, 413 US 717.

The exclusivity of this "rigidified" (*San Antonio School Dist. v Rodriguez*, 411 US, at p 98) two-tier system was overtly challenged when the existence of yet a third test was posited by Justice MARSHALL in his *Rodriguez* dissent (*supra*, p 70). Citing to a number of earlier determinations,[25] Justice MARSHALL concluded that the court had consistently adjusted the care with which it had reviewed statutory classifications in light of "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." (411 US, at p 99.)

While the Supreme Court has never expressly abandoned the theory of two-tier review, it is apparent that where the classifications involved or the interests invaded have appropriate standing, the rational basis standard takes on a "sharper focus" (*Craig v Boren*, 429 US 190, 210-211, n [POWELL, J., concurring]) which is sometimes described as "heightened" or "intermediate" scrutiny (*Rostker v Goldberg*, 453 US —, —, 49 USLW 4798, 4801; *Wengler v Druggists Mut. Ins. Co.*, 446 US 142; see, generally, Tribe, American Constitutional Law, § 16-30; Gunther, Constitutional Law, Cases and Materials [10th ed], ch 10). Indeed, the Supreme Court has invoked a "range"[26] of intermediate approaches to semi-suspect or sensitive classifications premised upon characteristics such as gender (e.g., *Rostker v Goldberg, supra; Kirchberg v Feenstra*, 450 US 455; *Wengler v Druggists Mut. Ins. Co., supra; Califano v Westcott*, 443 US 76; *Caban v Mohammed*, 441 US 380; *Orr v Orr*, 440 US 268; cf. *Frontiero v Richardson*, 411 US 677 [plurality applying strict scrutiny]) or illegitimacy (e.g., *Trimble v Gordon*, 430 US 762; *Matthews v Lucas*, 427 US 495; *Weber v Aetna Cas. & Sur. Co.*, 406 US 164; *Levy v Louisiana*, 391 US 68; cf. *Lalli v Lalli*, 439 US 259) and to classifications which infringe on important, although not constitutionally "fundamental" or "preferred" interests, such as the benefit of continued receipt of food stamps (*United States Dept. of Agric. v Murry*, 413 US 508; cf. *United States Dept. of Agric. v*

25. *James v Strange*, 407 US 128; *Weber v Aetna Cas. & Sur. Co.*, 406 US 164; *Eisenstadt v Baird*, 405 US 438; *Reed v Reed*, 404 US 71.

26. Tribe, American Constitutional Law, p 1092.

Moreno, 413 US 528 [explicit equal protection]), affordable college tuition (*Vlandis v Kline*, 412 US 441), retention of a driver's license (*Bell v Burson*, 402 US 535), employment in the Federal civil service (*Hampton v Mow Sun Wong*, 426 US 88), a father's interest in custody of his child (*Stanley v Illinois*, 405 US 645) or a child's interest in obtaining certain Social Security benefits (*Jimenez v Weinberger*, 417 US 628).

Although the "important interest" cases noted were decided on due process principles, they have been recognized as "conceptually equivalent to an equal protection challenge" to the pertinent statutes (Phillips, Irrebuttable Presumptions: An Illusory Analysis, 27 Stanford L Rev 449, 450; Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv L Rev 1534, 1555-1556; Tribe, American Constitutional Law, § 16-31, p 1090, n 10; see *Cleveland Bd. of Educ. v LaFleur*, 414 US 632, 652 [POWELL, J., concurring]), and the heightened scrutiny invoked is explainable on the basis of the importance of the interests to the affected individuals. There seems little doubt that the Supreme Court employs an elevated level of review when it deems the interests involved to be of sufficient importance (see Note, 27 Stanford L Rev 449, 460; Note, 87 Harv L Rev 1534, 1550; Tribe, American Constitutional Law, § 16-31, p 1090), particularly when legislative and administrative processes seem systemically resistant to change (*id.*, p 1092).

The critical differences between the rational basis standard and heightened or intermediate scrutiny are readily visible. Under the rational basis test, challenged legislation will survive if it furthers a merely "legitimate" State interest and if any state of facts can be rationally conceived — even by the court itself — to support the classification (see *Western & So. Ins. Co. v State Bd. of Equalization*, 451 US 648; *McGowan v Maryland*, 366 US 420; *Williamson v Lee Opt. Co.*, 348 US 483; *Railway Express v New York*, 336 US 106).

But under the intermediate approaches, the challenged classification must serve "important", rather than merely "legitimate", government objectives and it must "substantially" further their achievement (see *Craig v Boren*, 429

US 190, 197, *supra)*; it will not suffice that the classification rationally could be conceived as furthering the end. Furthermore, the rationale for the classification must be articulated by its defenders and must have been a motivating rationale for the law, rather than one supplied by afterthought (see Tribe, American Constitutional Law, § 16-30, pp 1083-1085; Gunther, The Supreme Court 1971 Term- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv L Rev 1, 28, 35, 44-47). Even if an "important" objective is "substantially" served, however, it must be established that a less intrusive alternative could not accomplish the same purpose (see *Orr v Orr*, 440 US 268, 279, *supra; Craig v Boren, supra*, p 197; *Matthews v Lucas*, 427 US 495, 513, *supra; Jimenez v Weinberger*, 417 US 628, 636, *supra; Trimble v Gordon*, 430 US 762, 772, n 14, *supra; Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326, 336). Finally, and quite significantly, the party defending the classification has the burden of demonstrating both the importance of the governmental purpose to be served and the substantial relationship between chosen means and articulated end (see *Wengler v Druggists Mut. Ins. Co.*, 446 US 142, 151, *supra; Caban v Mohammed*, 441 US 380, 393, *supra; Craig v Boren, supra*, p 204).

In New York there is forthright recognition that circumstances exist "where the right sought to be vindicated might be found to call for a test somewhere along the sliding scale between strict scrutiny at one end and rational basis at the other" (see *Montgomery v Daniels*, 38 NY2d 41, 61) and such an intermediate standard was applied when the Court of Appeals decided the reverse discrimination issue in *Alevy v Downstate Med. Center of State of N. Y.* (39 NY2d 326, *supra)*. Writing for the *Alevy* court, Judge GABRIELLI rejected the "polarized and outcome-determinative" (39 NY2d, at p 333) traditional equal protection tests and applied an intermediate scrutiny formula. Two subsequent illegitimacy cases (see *Matter of Lalli*, 43 NY2d 65, affd *sub nom. Lalli v Lalli*, 439 US 259; *Matter of Fay*, 44 NY2d 137, app dsmd *sub nom. Buck v Hunter*, 439 US 1059) also became the subject of the intermediate test. In this State, equal protection analysis

is not bound to a formula that contains two extremes but no middle.

VI

We are precluded from applying strict scrutiny in the instant case because the State's highest court has twice cited *Rodriguez* (411 US 1, *supra*) in support of statements that education is not a fundamental right (see *Alevy v Downstate Med. Center of State of N. Y.*, *supra*, pp 332-333; *Matter of Levy*, 38 NY2d 653, 658, app dsmd 429 US 805, reh den 429 US 966). Aware that the doctrine of *stare decisis* binds us to follow the holdings of courts higher than our own, the original plaintiffs argue that *Levy* is distinguishable, *Alevy* is not applicable, and the references to educational nonfundamentality in both cases are not binding here. While it may be crucially significant that *Rodriguez* premised its conclusion of nonfundamentality on the view that the United States Constitution does not explicitly or implicitly guarantee education — and New York's Constitution does — we see no intellectually defensible method of holding education fundamental in the face of apparently contrary statements from the Court of Appeals, and we will not seek to downplay their significance (see *Gimble Bros. v White*, 256 App Div 439; *People v Cascia*, 191 App Div 376; *United States v DiFrancesco*, 604 F2d 769, revd 449 US 117; *United States v Bell*, 524 F2d 202). Therefore, while State courts have the right to give broader sweep to State constitutional guarantees than the Supreme Court provides for similar Federal guarantees (*Minnesota v Clover Leaf Creamery Co.*, 449 US 456, 461, n 6; *Oregon v Hass*, 420 US 714, 719; *People v Barber*, 289 NY 378, 384) and both California (see *Serrano v Priest* [II], 18 Cal 3d 728, *supra*) and Connecticut (see *Horton v Meskill*, 172 Conn 615, *supra*) have found education fundamental under their Constitutions, the ultimate message on fundamentality in this State must emanate from the Court of Appeals. Nor would it be proper, at our level of appellate review, to emulate the approach the California Supreme Court took following *Rodriguez* (see *Serrano v Priest* [II], *supra*) and seek potential escape from the bar of nonfun-

damentality by determining whether school district wealth is a suspect classification under the New York Constitution.

With strict scrutiny barred, invocation of intermediate or intensified review depends on the importance of the interest or right allegedly invaded. None would dispute that education "fulfill[s] 'a most fundamental obligation of government to its constituency'" (*Ambach v Norwick*, 441 US 68, 74, quoting *Foley v Connelie*, 435 US 291, 297) and that it is "perhaps the most important function of state and local governments" (*Brown v Board of Educ.*, 347 US 483, 493; see, also, *Ambach v Norwick, supra; San Antonio School Dist. v Rodriguez*, 411 US 1, 29, *supra; Wisconsin v Yoder*, 406 US 205, 213; *Adler v Board of Educ.*, 342 US 485, 493; *Pierce v Society of Sisters*, 268 US 510; *Meyer v Nebraska*, 262 US 390). Its position as a primary obligation of this State was noted by the committee which drafted the opening section of the education article of the State Constitution in 1894: "There seems to be no principle upon which the people of this commonwealth are so united and agreed as this, that the first great duty of the State is to protect and foster its educational interests." (Report of the Committee on Education and the Funds Pertaining Thereto, 2 Documents of Constitutional Convention of State of NY, 1894, Doc No. 62, p 3.)

While it may be a matter of wonder as to who might argue that education is not important, the question we treat is of constitutional and not merely societal import. In both respects, Chief Justice WARREN'S words of 27 years ago are relevant: "[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (*Brown v Board of Educ.*, 347 US 483, 493, *supra*,

quoted in *San Antonio School Dist. v Rodriguez*, 411 US 1, 30, *supra*.)[27]

Although the *Rodriguez* conclusion of no guarantee of equal educational opportunity has reduced *Brown's* sweep to that of racial discrimination, none can doubt that we deal here with obligations and rights which lie at the philosophic roots of the national fabric, which in the prior century became a direct command of our State Constitution, reinforced by compulsory attendance laws and annually supported by the State's greatest single financial exertion.[28] If institutional stability requires that we find the right to education not constitutionally fundamental in New York, we suspect there could be little disagreement with the view that the right represents an important constitutional interest. In this regard, we reject as misplaced the State's reliance on *Dorsey v Stuyvesant Town Corp.* (299 NY 512, cert den 339 US 981) for the proposition that *Rodriguez* (411 US 1, *supra*) compels application of the "rational relationship" standard of equal protection review. It is true that *Dorsey* posited the proposition that this State's equal protection guarantee (NY Const, art I, § 11) "is no more broad in coverage" than its Federal counterpart (299 NY, at p 530). But *Rodriguez* found that there was no implicit or explicit Federal guarantee of education as a matter of Federal constitutional jurisprudence. New York has its own constitutional mandate for education, and after independently canvassing our own constitutional scheme to gauge the degree of scrutiny to be applied to this case, we conclude that if our constitutional gaze cannot be strict, it must be as intense as intermediate analysis permits.

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27. The demand for equality of educational opportunity has a much earlier derivation than the postwar civil rights struggle. In their 1923 report, Strayer and Haig (see n 9) wrote (p 173): "There exists today and has existed for many years a movement which has come to be known as the 'equalization of educational opportunity' or the 'equalization of school support.'" A *New York Times* editorial of January 24, 1923 advocated "such legislation as would assure the country child educational advantages in every corner of the state comparable with those of the city child, and at the same time equalize the educational burden so far as that could be done." It is obvious that the *Times* was writing for a different era.

28. The total general fund budget adopted by the State for 1980-1981 was $15,182,000,000 which included $186,000,000 in Federal revenue sharing funds. The total amount appropriated for education was $4,463,659,000, which represented 29% of the budget (NYS Budget Summary, 1981-1982, pp 45, 47). The amount raised locally for education was even higher.

Once it has been demonstrated that an important interest has been infringed, the first prong of intensified — though less than strict — equal protection review mandates inquiry as to whether the challenged classification substantially furthers the important governmental purpose the State articulates to defend it. If the State meets that test, it still must show under the second prong that the objectives advanced by the classification cannot be achieved by a less intrusive alternative.

Here, the disputed classification makes education a function of wealth and permits invidious disparities in education and educational opportunity between school children on the basis of the property wealth of the school districts in which they reside. Trial Term *(Board of Educ. v Nyquist*, 94 Misc 2d 466, 523, *supra)* identified education and equality of educational opportunity as the "state * * * interests which the statutory plan is designed to satisfy" and found them unsatisfied. But the justification the State actually offered for the statutory scheme was preservation of local control. Intermediate scrutiny requires consideration of the important interest which the State — and not the court — articulates to defend a classification *(Alevy v Downstate Med. Center of State of N. Y.*, 39 NY2d 326, 336, *supra;* see Gunther, The Supreme Court 1971 Term- Foreword, 86 Harv L Rev 1, 35, 47; Tribe, American Constitutional Law, § 16-30, pp 1083-1085). The important interest proffered in this case is preservation of local control. Not only is that interest important (see *Dayton Bd. of Educ. v Brinkman*, 433 US 406, 410), but we view it as supplying an appropriate motivating rationale for structuring the educational scheme around separate school districts.

[2] We balance, then, the extensive evidence of disparity and discrimination against the justification the State offers — that the present method of financing education preserves local autonomy. We find that the State has not sustained its burden of proof. In school districts containing a large percentage of the State's school children, the current wealth-based system severely constrains the ability of school boards and administrators to provide the personnel services, curricula and even the equipment to furnish the educational offerings they deem suitable for their pupils.

The freedom to choose and deliver desired educational output is so inextricably and demonstrably linked to the degree of property wealth behind each pupil that meaningful local independence is largely reserved for areas with the real estate resources to exercise it. Local school districts cannot choose to have the best education by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property in the district.[29] For the property poor, local control of education is more illusory than real, for it cannot be utilized to produce the educational output local authorities preceive as appropriate but only what a limited local tax base will permit. Since "[a] general policy of local control affords no real justification for maintaining a school finance ghetto" (Carrington, Financing the American Dream: Equality and School Taxes, 73 Col L Rev 1227, 1259), we reject the defendants' contention that local independence of choice is furthered by the fiscal scheme by which education is currently funded.

Furthermore, if some other process of reasoning could lead us to the conclusion that local educational independence is preserved rather than eroded by the present system, we would still be impelled to decide that the end can be accomplished by financial means which do not foster a discriminatory educational system pitched toward wealth and strongly favoring children whose good fortune it is to have affluent parents or neighbors and therefore to be endowed with educational opportunities unavailable to many of their peers. Although we neither suggest nor indorse any of the numerous proposals for educational finance reform offered by various of the trial witnesses,[30] interested agencies,[31] and other educational experts and

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29. See *San Antonio School Dist. v Rodriguez*, 411 US 1, 128 [MARSHALL, J., dissenting].

30. These include Professor Walter I. Garms of the University of Rochester; Professor Donna Shalala of Columbia University; Dr. Joel S. Berke, Director of the Education Policy Research Institute of the Educational Testing Service; John J. Callahan, Past Director, School Finance Project for the National Conference of State Legislatures, Washington, D.C.

31. Research Findings and Policy Alternatives: A Second Interim Report of the New York State Special Task Force on Equity and Excellence in Education, Sept., 1980, The Fleischmann Report, n 9.

commentators,[32] we have no doubt that, when finally confronted with the constitutional invalidity of the current finance structure, the legislative bodies which were successful in establishing one of the Nation's finest systems of higher education can produce solutions that will provide equitable sustenance to permit our educational localities to exert the requisite efforts and make the independent judgments to create educational outputs which they deem suitable to local need. A fiscal scheme which affords a constitutional degree of equality of educational opportunity need not be inconsistent with local freedom of choice.

[3] Having thus determined that the current educational finance system is discriminatory and that it cannot survive a heightened level of State constitutional scrutiny, we nevertheless depart from the trial court's determination that the Fourteenth Amendment has been transgressed. Relying on certain dicta in the *Rodriguez* opinion (411 US 1, *supra*), the able Trial Justice concluded that the evidence warranted his finding a violation of the Fourteenth Amendment. In the course of concluding that the Constitution does not guarantee the right to education, the *Rodriguez* court observed (p 36) that "[e]ven if it were conceded that some identifiable quantum of education" was a constitutionally protected prerequisite of the exercise of First Amendment or electoral franchise rights — both of which the Constitution does guarantee — there was no evidence of such deprivation in the case before it. Although we do have evidence that significant numbers of New York pu-

32. See, e.g., Coons, Clune & Sugarman, Private Wealth and Public Education; Burke, "A Dynamic Finance Policy", Financing the Changing School Program, Proceeding of the Fifth National School Finance Conference, pp 83-84; Burrup, Financing Education in a Climate of Change (2d ed), pp 262-274; Jones, Financing Public Elementary and Secondary Education, pp 28-84; Lindman, "The Conant Plan — Shall the States Take Over the Financing of Schools?", The School Administrator (Wash, D.C., Feb., 1970); Mort, Reusser & Polley, Public School Finance: Its Background, Structure, and Operation (3d ed), pp 255-285; Andersen, School Finance Litigation — The Styles of Judicial Intervention, 55 Wash L Rev 137; Carrington, Financing the American Dream: Equality and School Taxes, 73 Col L Rev 1227; Chin, An Analysis and Review of School Financing Reform, 44 Fordham L Rev 773; Grubb, The First Round of Legislative Reforms in the Post-*Serrano* World, 38 Law and Contemporary Problems 459; Silard & Goldstein, Toward the Abolition of Local Funding in Public Education, 3 Journal of Law and Education 307; Thomas, Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment, 48 U of Cin L Rev 255; Zelinsky, Educational Equalization and Suburban Sprawl: Subsidizing the Suburbs Through School Finance Reform, 71 NW U L Rev 161.

pils are deprived of the basic educational minimums required by the education article of the State Constitution, neither the *Rodriguez* dictum (which left the "quantum of education" question totally obscure) nor the Supreme Court's holding in *Lau v Nichols* (414 US 563) provides any basis for us to declare that, on this record, New York has deprived its young people of First Amendment and electoral franchise rights to such an extent that the Fourteenth Amendment is violated. *Lau* dealt with a violation of the 1964 Civil Rights Law and not the Fourteenth Amendment, and even if the *Rodriguez* dictum is to be construed as mandating some educational minimum for the exercise of First Amendment and electoral rights, we know not what it is. There is no foundation, then, for a current declaration that New York's educational funding structure contravenes the Fourteenth Amendment. It suffices that plaintiffs' guarantee of equal protection of the law under section 11 of article I of the State Constitution has been invaded.

Finally, it is necessary to deal with Justice HOPKINS' critique of the legal methodology and factual underpinnings of our equal protection holding. With typically consummate skill, our colleague has expressed the reasons which deter him from concluding that the equal protection clause of the State Constitution has been violated. We cannot agree, however, that the *Rodriguez* case determined New York's equal protection questions any more than it did those of California (see *Serrano v Priest* [II], 18 Cal 3d 728, 766-767, *supra*), or Connecticut (see *Horton v Meskill*, 172 Conn 615, 640-641, *supra*). Our colleague's reliance is on Justice POWELL's assertion that the *Rodriguez* record lacked proof of absolute deprivation of education or of a definable suspect class of poor people — the latter because both poor and nonpoor might reside in some of the property-poor school districts. But that reference by the *Rodriguez* majority addressed the measure of scrutiny to be employed in determining the Federal equal protection issues (*San Antonio School Dist. v Rodriguez*, 411 US 1, 19, 23-24, *supra*) and not the ultimate merits of the equal protection claims. As we have previously noted, New York's Constitution explicitly guarantees education, and if

that right is not fundamental, the significance of its substance in our constitutional scheme cannot be gainsaid. Therefore, proof of absolute educational deprivation, which might impinge upon other fundamental rights guaranteed by the Federal Constitution, simply is not a prerequisite of intermediate scrutiny of the constitutionally important interest of education under our State Constitution.

Nor can we concur that plaintiffs' proof (in its ultimate effect) circumstantially suggests nothing more than the existence of lower ratios of teachers to staff and the other inequalities in staffing. We believe there is an overwhelming mass of direct proof — reflected in our findings — of the existence of severe inequities in the educational system based on differences in district property wealth. There also is a virtual plethora of evidence, direct and circumstantial, that the levels of education available in the poorer areas are significantly reduced. What is determinative of the equal protection issues before us is not whether there is absolute deprivation of educational minimums, but whether the palpable proof of clearly lesser educational opportunity based on wealth discrimination establishes violation of the equal protection provision of the State Constitution. We think it does.[33]

In reaching our conclusion of equal protection violation, we are not oblivious to Justice HOPKINS' concern with the prospect of litigative reverberations upon other areas of State function. In our view, however, there can be no justification for overlooking a violation of the equal protec-

33. Justice HOPKINS has quoted Private Wealth and Public Education (see n 2) relative to the "inadequacy of social science to delineate with any clarity the relation between cost and quality." The quoted volume espoused the doctrine of "fiscal neutrality" and is often credited with providing much of the intellectual impetus for educational finance reform (see, e.g., Thomas, Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment, 48 U of Cin L Rev 255; Tractenberg, Reforming School Finance Through State Constitutions: Robinson v Cahill Points the Way, 27 Rutgers L Rev 365; Zelinsky, Educational Equalization and Suburban Sprawl: Subsidizing the Suburbs Through School Finance Reform, 71 NW U L Rev 161). Although we believe the current record graphically demonstrates the differences in quality of education based on cost, we note that the quotation relied on by Justice HOPKINS continues with the following: "We regard the fierce resistance by rich districts to reform as adequate testimony to the relevance of money. Whatever it is that money may be thought to contribute to the education of children, that commodity is something highly prized by those who enjoy the greatest measure of it. If money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure." (Coons, Clune & Sugarman, Private Wealth and Public Education, p 30.)

tion clause of the State Constitution on the ground that additional litigation may ensue in other areas of governmental concern (see *Serrano v Priest* [I], 5 Cal 3d 584, 613-614, *supra*). Furthermore, in terms of equal protection, education has qualities of constitutional uniqueness because it has not been delegated to municipal or local government; rather, it is a "State function to be kept separate and apart from all other local or municipal functions" (*Lanza v Wagner*, 11 NY2d 317, 326, app dsmd 371 US 74; NY Const, art IX, § 3, subd [a], par [1]; see *Matter of Board of Educ. v City of New York*, 41 NY2d 535; *Matter of Divisich v Marshall*, 281 NY 170; *People ex rel. Wells & Newton Co. v Craig*, 232 NY 125; *Matter of Emerson v Buck*, 230 NY 380; *Gunnison v Board of Educ.*, 176 NY 11).

We also disagree with our colleague's conclusion that the plaintiffs' municipal overburden argument is flawed because this court lacks the power to decide whether there has been a fair division of municipal resources as between various services. As Justice WEINSTEIN notes in his eloquent concurrence, we believe that the record presents compelling proof that problems of the central cities are deep seated and inexorable and that the resulting lack of educational funds is not a mere consequence of lack of wisdom in allocating municipal resources.

Ultimately, then, we cannot accept the contention that the profound inequities reflected in our factual findings are beyond the reach of judicial remedy even though required reform has been systemically resisted by the bodies empowered to deal directly with the problem.[34]

VII

The final issue concerns the claim that the education article of the State Constitution is violated by an educational finance system which creates vast interdistrict variances in educational quality and from which many city children seem to receive precious little in the way of preparation for the future. The mandate of the education

34. We view *Lombardi v Nyquist* (63 AD2d 1058, mot for lv to app den 45 NY2d 710), cited in the opinion of Justice HOPKINS, as hinging upon a failure of petitioner's proof, rendering any discussion of the equal protection question dictum. Furthermore, we draw no conclusion from the Court of Appeals denial of review (see *Matter of Dobbs Ferry Union Free School Dist. [Dobbs Ferry United Teachers]*, 51 NY2d 861).

article to maintain and support a school system in which all the children may be educated is brief, and its reference to education is devoid of semantic adornments such as "thorough and efficient",[35] "efficient",[36] "ample",[37] or "uniform"[38] which are found in the Constitutions of some of our sister States. Drawing on "thorough and efficient", the New Jersey Supreme Court struck down the State's educational finance structure by concluding that the 1875 amendments which delegated taxing power to local districts had equal educational opportunity for children "precisely in mind", for a "'thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years'" could have no other import (*Robinson v Cahill*, 62 NJ 473, 513, *supra*). The Washington State Supreme Court tied its holding of unconstitutionality to an article which declared it was the "paramount duty" of the State to make "ample provision" for the education of all the children (*Seattle School Dist. No. 1 v Washington*, 90 Wn 2d 476, 495). Unless it is to be argued that New York's education article is without parameters, we must conclude that, under its unembellished education article, the State must provide its children at least as much as what others must furnish pursuant to constitutional directives such as "thorough and efficient", or "ample".

In adopting the education article in the 1894 Constitution, the State electorate mandated the maintenance of a system of schools in which all the children of the State could be equipped with certain basic educational skills necessary to function effectively in society. As the committee which drafted the article stated in its report: "The public problems confronting the rising generation will demand accurate knowledge and the highest development

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35. See Md Const, art VIII, § 1; Minn Const, art XIII, § 1; NJ Const, art VIII, § 4, par 1; Ohio Const, art VI, § 2; Pa Const, art III, § 14; SD Const, art VIII, § 15; W Va Const, art XII, § 1; Wyo Const, art VII, § 9.

36. See Del Const, art X, § 1; Ill Const, art X, § 1; Ky Const, § 183; Tex Const, art VII, § 1.

37. See Wash Const, art IX, § 2.

38. See Ariz Const, art XI, § 1; Col Const, art IX, § 2; Fla Const, art IX, § 1; Idaho Const, art IX, § 1; Ind Const, art 8, § 1; Minn Const, art XIII, § 1; Nev Const, art XI, § 2; NM Const, art XII, § 1; NC Const, art IX, § 2, subd [1]; ND Const, art VIII, § 4; Ore Const, art VIII, § 3; SD Const, art VIII, § 1; Utah Const, art X, § 1; Wash Const, art IX, § 2; Wyo Const, art VII, § 1.

of reasoning power * * * must be permanent, broad, and firm if the superstructure is to be of real value." (Quoted in 3 Lincoln, Constitutional History of New York, at p 555.)

This declaration of policy and intent, however, does not crystallize the basic educational skills required in 1894 as the prototype for the skills necessary to function in today's society. Rather, the intent of the drafters was to accommodate a system of free public schools which would produce individuals capable of dealing with the problems facing their own generation. The absence of adorning language in New York's education article does not reduce the State's duty to that of inculcating the minimal skills of reading, writing and arithmetic (see *Seattle School Dist. No. 1 v Washington*, 90 Wn 2d 476, 517, *supra*). Two States have found the basic education which falls within the ambit of their Constitutions as "[embracing] broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas." (*Seattle School Dist. No. 1 v Washington*, *supra*, p 517; *Robinson v Cahill*, 62 NJ 473, 515, *supra*; see, also, *San Antonio School Dist. v Rodriguez*, 411 US 1, 37, *supra*; *Wisconsin v Yoder*, 406 US 205, 221, *supra*.) We believe section 1 of article XI of the New York Constitution requires no less.

In ascertaining the measure of education which our schools must be capable of affording their pupils, we are aided both by statute (see Education Law, § 3204, subd 3) and by regulations of the New York State Education Department (see 8 NYCRR 100.1 [a]-[e], promulgated under Education Law, § 207), which define the approved curricula for primary and secondary schools (8 NYCRR 100.1 [a]-[e]).[39] In determining whether the mere existence of these prescribed courses suffices to comport with the con-

39. The required course of study for the first eight years of full-time public day schools includes music, visual arts, arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science (Education Law, § 3204, subd 3, as expanded by 8 NYCRR 100.1 [e]).

An approved high school course of study must include four units of English, three units of social studies, including one year of American history, one unit each of mathematics and science; one-half unit of health, and physical education. Additional free electives are necessary to complete the program (8 NYCRR 100.1 [a]-[c]).

stitutional command that the public schools be capable of providing an education for all children of the State, we cannot ignore the findings that thousands of children fail to acquire even minimal skills in reading, vocabulary and mathematics in lower grades and later underachieve or fail because they lack those skills; that thousands who pass through the school system can only decode words without comprehending them, cannot use graphs, maps or indexes, and cannot apply acquired knowledge — minimal as it may be — to solve problems; that thousands who attend high school read at a fifth grade level or below and some of these read at a third or even second grade level; and that some students leave the system wholly illiterate. The intervenor-plaintiffs, with 35.8% of the State public school enrollment in 1975-1976, had 52.4% of the State's pupils with special educational needs — defined as those scoring below minimum competency by State standards. In the urban centers, 25 to 35% more students than elsewhere score below minimum competency by standard measurements.

The failure to obtain an education, of course, is not necessarily reflective of a failure to the present school system to meet its constitutional obligation to make that education available. We harbor no illusion that all the failings in pupil achievement we have described flow from incompetence of the educational system, for we are aware of other deep-seated societal and familial failures which contribute in substantial degree to the problems of educating disadvantaged youth. Nevertheless, the record before us establishes that many of the children who fail to obtain minimal skills are educable and that properly staffed remedial programs, which afflicted school districts are prevented from providing because of fiscal constraints and misallocation of resources, do alleviate or totally remedy learning problems.[40] In sum, despite their disadvantaged background, many of those who leave New York's educational system uneducated could be provided with skills which would equip them for life's future demands.

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40. The potentiality for effectiveness of such programs may be revealed by recent test results showing some reading improvement in two grades in the New York City schools (*New York Times*, Sept. 8, 1981, p B1, col 6).

[4] In the face of evidence demonstrating that large numbers of children emerge from the school system lacking even the minimal tools necessary to function in society, and that the current financing scheme is in good measure a cause for the failures, we must conclude that the education article is violated by a method of financing which fails to establish a school system capable of providing an education for many educable children.[41]

Accordingly, the judgment should be modified (1) by deleting the three final sentences from decretal paragraph 1(a) and substituting the following: "The system presently impinges upon the important right of education guaranteed to all children of this State by section 1 of article XI of the New York Constitution in the plaintiff and intervenor-plaintiff school districts. The system fails to further the asserted State interest of preserving local control over education in these districts. It also fails because there are methods of financing public school education which would further local control over education with less intrusion upon the right of education guaranteed to all children of the State. Accordingly, New York's public school finance system violates the equal protection clause of the New York State Constitution (art I, § 11)"; (2) by deleting from the penultimate sentence of decretal paragraph 1(c) the words "and irrational"; and (3) by deleting from the final sentences of decretal paragraphs 1(c), 1(d) and 1(e) the words "and of the Federal Constitution (the Fourteenth Amendment)" and substituting the following declaration: "New York's school financing system is constitutional under the Fourteenth Amendment to the Constitution of the United States." As so modified, the judgment should be affirmed.

WEINSTEIN, J. (concurring). I concur in the opinion of Justice LAZER that the State system for financing public elementary and secondary schools violates the equal protection clause of the State Constitution and in the opinions of both Justices HOPKINS and LAZER that the subject legis-

41. Our determination should not be read to mean that the failure to obtain an education is a legally compensable wrong (cf. *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440); rather, we conclude that the large numbers of educational failures presented in the record, which are potentially remediable, are evidence to warrant a finding that the system fails under the education article.

lation also violates the education article of the State Constitution. This concurring opinion will focus on the equal protection claims of the intervening school districts, especially New York City.

The State financial aid to education scheme awards less aid to school districts with higher than average property wealth and adjusted gross income and proportionately lower attendance rates on the assumption that such districts can more easily provide local funding for education. Although initially this appears reasonable and equitable, further consideration reveals that in fact the impoverished and minority children in the intervening large city school districts receive less aid for their education notwithstanding their greater needs because the education aid formula either omits entirely or takes insufficient account of the large cities' inexorable problems, their municipal and education overburdens, their lower attendance rates and the lower value of their educational dollar.

1.

The State education aid scheme has an inequitable impact on the children in the intervenors' schools. Urban children receive less aid for their education than do children in rural and suburban schools.

The problems which beset the cities are the subject of numerous findings and are admirably set forth in summary fashion in Justice LAZER's opinion. The conditions are familiar and include such intractable problems as crime, an aging physical plant and all the circumstances attendant upon a multiracial, multiethnic population, a large segment of which is impoverished, particularly in a port of entry. These widely publicized problems are not of the cities' making and the cost of coping with them is hardly a matter of choice. Indeed, the very survival of the cities may depend on the success of their efforts to overcome these problems. In addition, the cities are burdened with a number of noneducation costs which have been mandated by the State. Accordingly, the cities' higher noneducation costs (the municipal overburden) are inexorable.

Since the cities' ability to raise taxes is limited by economic and political factors as well as by the State Constitution (art VIII, § 10; *Hurd v City of Buffalo*, 34 NY2d 628), a consequence of the inexorable municipal overburden is that the cities have less funding available for educational services.[1] The cities' reduced educational resources are therefore not the outcome of an optional preference, but the inevitable result of circumstances beyond their control.[2]

At the same time, a number of special educational problems compete for the cities' limited educational resources (the educational overburden). The cities have a larger proportion of pupils with special educational requirements — children who fail to achieve ("below minimum competence" students or "PSEN"), children who have difficulty with the English language, children who are excessively absent from school and children with physical and emotional handicaps. The high absentee rate of the cities' pupils is inexorable.

The State education aid formula awards aid in inverse proportion to real property wealth and adjusted gross income and employs attendance as a factor in both the measure of the district's ability to support education and the measure of the district's education needs. Since, with the exception of Buffalo, the cities' real property wealth and adjusted gross income are above the State average and since the attendance rate of the cities' pupils is comparatively low, the formula awards less than average aid to city students.

The disproportionate impact of the education aid legislation on the cities' public school children is well established. The intervenor cities have 37% of the State's public school pupils, including 56% of the State's "below minimum competence" students, but will receive only 32.9% of the State's education operating aid. New York City, with 33% of the State's public school enrollment, including 51% of

1. Summary, Research Findings and Policy Alternatives: A Second Interim Report of the New York State Special Task Force on Equity and Excellence in Education, Sept. 1980, pp 6-7.

2. Zelinsky, Educational Equalization and Suburban Sprawl: Subsidizing the Suburbs Through School Finance Reform, 71 Nw U L Rev 161, 165, 184-186, 189-190, 198, 203; *Robinson v Cahill*, 67 NJ 333, 351, 369.

the State's "below minimum competence" students, will receive only 29% of the State's education operating aid. Alternatively stated, for the school year 1981-1982, the intervenors will receive the following amounts of State operating expense aid per pupil unit: Rochester, $826; New York City, $931; Syracuse, $935; Buffalo, $1,075. The corresponding average amount for the rest of the State is $1,000. The intervenors enroll 57% of the most seriously handicapped students in the State's public schools (that is, pupils who have been found to require special programs 60% or more of each school day), but the additional aid received for such students will be $1,628 in New York City, $1,873 in Rochester, $2,088 in Syracuse and $2,212 in Buffalo. The corresponding average amount for the rest of the State is $1,921.

This discrimination against city students was recognized by the Regents who, in 1976, recommended a modification of the pupil count and the use of the same pupil measure for both fiscal capacity and need in order to provide a more equitable pupil count and greater equity.[3]

2.

In giving less aid to city students, the education aid formula has a disproportionately adverse effect not only on pupils from impoverished families, but also with respect to race, country of origin and alienage.

The cities' populations are multiracial and multiethnic and include a large number of immigrants from a host of countries. The Immigration Act of 1965 increased the size and diversity of Asian groups in New York City[4] and the proportion of "nonwhite" (i.e., black, Asian, American Indian and "other") persons in that city's population increased from 23.4% in 1970 to 39% in 1980.[5] In contrast, "nonwhites" constitute only 20.5% of the State's total population. Analysis reveals that 83% of the State's "nonwhites" live in the intervenor cities, 77% of them in New York City. New York City's population includes 74% of the State's blacks, 74.6% of the State's "Asian or Pacific

3. Major Recommendations of the Regents for Legislative Action 1977, Nov., 1976.

4. Hune, "Asian Americans in New York City", The Jewish and Ethnic Studies Project, Metropolis Booklet.

5. 1980 Census Bureau figures.

Islanders", 88.7% of the State's "others" and 84.7% of the State's persons of "Spanish Origin".

This diversity of population is reflected in the cities' public schools, particularly those of New York City. In 1974-1975, New York City had 78.2%, and the combined four intervening districts 84.4% of the State's "minority" students.[6] *At the time of the trial, 100,000 to 110,000 New York City students were unable to participate in school effectively in English*, and some of the cities' immigrant pupils were totally illiterate in their own tongues.[7] In 1979-1980, New York City had 76.9% and the combined four intervening districts had 83.1% of the State's black and "Hispanic" students.[8] Of the 963,048 students enrolled in the city's public elementary and high schools, 371,302 (38.6%) were "Black (not Hispanic Origin)", 286,693 (29.8%) were Hispanic, 36,880 (3.8%) were "American Indian, Alaskan Native, Asian or Pacific Islander", and the remaining 268,173 students (27.8%) were "white (not Hispanic Origin)".[9]

In giving less aid to the cities' students, particularly those of New York City, the education aid scheme has a disproportionate impact on the State's minority students.

3.

While disparate impact alone is not determinative of the constitutionality of the subject legislation and proof of discriminatory intent is required, the fact that the law bears more heavily on one race than another is one of the totality of relevant facts from which an invidious discriminatory purpose may be inferred. To determine whether invidious discriminatory purpose was a motivating factor, a sensitive inquiry into all available evidence of intent is required and disproportionate impact provides an important starting point (*Washington v Davis*, 426 US 229, 241-242; *Arlington Hgts. v Metropolitan Housing Corp.*, 429 US

6. IFF 162, citing Racial/Ethnic Distribution of Public School Students and Staff in New York State 1974-75, Table 2, Exhibit 147, A 2400. The word "minority" in the cited exhibit refers to the total of "Black and Spanish Surnamed American".

7. Students without facility in English spoke a wide variety of foreign languages, including Spanish, Chinese, Italian, Greek, French, Vietnamese and Russian.

8. Racial Ethnic Distribution of Public School Students and Staff in New York State 1979-80, Table 2.

9. *Id.*, Table 1.

252, 265-266; *Personnel Administrator of Mass. v Feeney*, 442 US 256, 271-274).

Among the evidentiary sources as to intent are the historical background and the legislative history (*Arlington Hgts. v Metropolitan Housing Corp., supra*, pp 267-268). The foundation system, which for all practical purposes remains in effect today, was adopted in the Cole-Rice Law of 1925 (L 1925, ch 675). The Diefendorf formula adopted in 1962 was an effort to correct inequities arising under the 1925 law and certain benefits formerly denied to the large cities were extended to them. The 1974 legislation was enacted in response to a wide consensus of opinion that the Diefendorf formula had not remedied the inequities. Yet today, 19 years after the adoption of the Diefendorf formula, the education aid legislation continues to have a substantial disproportionate impact on the public school children in the State's largest cities and the three fourths or more of the State's minority students who attend school in the intervening districts continue to receive proportionately less aid for their education.

The cases in which it was held that a discriminatory intent had not been proved are easily distinguished on their facts (cf. *Arlington Hgts. v Metropolitan Housing Corp.*, 429 US 252, *supra*; *Washington v Davis*, 426 US 229, *supra*; *Personnel Administrator of Mass. v Feeney*, 442 US 256, *supra*).

4.

In selecting the applicable standard of review, we have the right to find a stricter protective constitutional standard for New York than that set by the United States Supreme Court (*Minnesota v Clover Leaf Creamery Co.*, 449 US 456, 461, n 6) and in recent years, a number of State courts, New York included, have construed "state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." (Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv L Rev 489, 495; *Town of North Hempstead v Exxon Corp.*, 53 NY2d 747, concurring opn of FUCHSBERG, J., pp 754-756.)

The degree of importance accorded the right to an education and the equal protection principles applicable to discrimination with respect to race, alienage and country of origin are reviewed fully in Justice LAZER's scholarly opinion. Close scrutiny was held to be the appropriate test where aliens as a class were barred from tuition assistance for higher education (*Nyquist v Mauclet*, 432 US 1; cf. *Ambach v Norwick*, 441 US 68).

The subject legislation has a disproportionately adverse effect with respect to so important a right as education on the vast majority of the State's minority students. *Minority children with greater needs are receiving not equal, but less aid* (cf. *Matter of Bernstein v Toia*, 43 NY2d 437). The number of children affected is enormous. Three quarters of New York City's approximately 1,000,000 students fall outside the classification of "white (not Hispanic origin)". One hundred thousand to 110,000 New York City pupils were unable to participate in school effectively in English at the time of the trial and 51% of the State's "below minimum competence" students are enrolled in the city's schools.[10]

All of the above circumstances supply a cogent reason for the application, if not of strict scrutiny, of the heightened scrutiny test developed in *Alevy v Downstate Med. Center of State of N. Y.* (39 NY2d 326, 336), and the State does not contend that no less objectionable financial aid scheme will advance the State's interest in the continuation of local control. Even under the "less than strict" but not yet "'toothless' standard of review",[11] the statutory scheme fails. When noneducational costs are inexorable, the cities have reached their taxing limit and the educational problems are ever more challenging, the extent of local control has become so limited that it can scarcely be maintained

10. In *San Antonio School Dist. v Rodriguez* (411 US 1, 11-12), the total enrollment in the Edgewood district was only 22,000 students. In *Lau v Nichols* (414 US 563, 572), the number of children involved of Chinese ancestry who did not understand English was 1,800 and Justice BLACKMUN concurred on the ground that "a very substantial group" was involved.

11. *Matter of Fay*, 44 NY2d 137, 144, app dsmd *sub nom. Buck v Hunter*, 439 US 1059; *Matter of Lalli*, 43 NY2d 65, 67, affd *sub nom. Lalli v Lalli*, 439 US 259; *Trimble v Gordon*, 430 US 762, 766-767; *Caban v Mohammed*, 441 US 380, 392, n 13.

that the statutory scheme *substantially* serves a *substantial* State objective.[12]

5.

For the reasons stated, I concur with Justice LAZER in the modification of the judgment.

HOPKINS, J.P. (concurring in part and dissenting in part). I agree that the present legislative scheme for funding public education violates the education article of the State Constitution (NY Const, art XI, § 1). I do not agree that the equal protection clause of the State Constitution has been breached (NY Const, art I, § 11). My disagreement proceeds, however, not so much from a divergence with the analysis of the proof and findings made by my brother LAZER, an analysis which admirably condenses the evidence in this difficult and intricate case, but rather from a differing view of the essence and purpose of the several tests which have been devised to determine whether there exists a violation of the equal protection clause.[1]

I

Our Constitution declares that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof" (NY Const, art I, § 11). This language parallels in almost the same words the command of the Fourteenth Amendment: "nor shall any State *** deny to any person within its jurisdiction the equal protection of the laws" (US Const, 14th Amdt, § 1). There appears no reason to suppose that the purpose and effect of the two provisions are or should be different (*Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 530-531, cert den 339 US 981); at the same time it is clear that the State courts must be the final arbiters of the interpretation to be given to the State Constitution. Nevertheless, at the very least the interpretation made by the Supreme Court of the United States concerning the meaning and effect of the Fourteenth Amendment must be granted great respect by the State

12. Cf. *Kramer v Union School Dist.*, 395 US 621, 623, n 3; *San Antonio School Dist. v Rodriguez*, 411 US 1, 51, n 108; *Matter of New York City School Bds. Assn. v Board of Educ.*, 39 NY2d 111, 119.

1. The thorough and painstaking review of the facts in the opinion written by Justice *L. Kingsley Smith* at Trial Term (*Board of Educ. v Nyquist*, 94 Misc 2d 466) must be commended. The magnitude of the evidence and the vast significance of the issues in the case are equalled by the careful attention and reflection which his opinion demonstrates.

courts when they are called on to construe the equal protection clause of the State Constitution.

Hence, we should not only acknowledge the binding judgment of the Supreme Court in *San Antonio School Dist. v Rodriguez* (411 US 1) concerning the meaning of Federal equal protection, but also pay full regard to the reasoning by which that judgment was reached by the Supreme Court, when we determine the meaning of the equal protection article in the State Constitution. Justice POWELL, in writing for the majority in *Rodriguez*, found no discrimination against the plaintiffs under the Texas statutes, because of the finding that their claim of comparatively little wealth did not result in a deprivation of educational opportunity *(supra*, pp 19, 23-24).

So here, despite the plethora of proof produced by the plaintiffs and the manifold findings of Trial Term, there is neither proof nor finding that any of the individual plaintiffs suffered an absolute deprivation of educational opportunity or even a substantial diminution of educational opportunity. What the plaintiffs' proof suggests circumstantially is that the complaining school districts employ a lower ratio of teaching staff to students, that their teaching staff may not possess as extensive experience or training, that they do not have as many guidance counselors, psychologists and ancillary staff, and that their curricula are more limited in subject matter than those that exist in wealthier districts.

Even so, such circumstantial findings do not show that the basic educational policy of the State in marshaling an adequate foundation for its students has been remotely violated. It is doubtful whether cost alone is decisive of the quality of education. "[T]he basic lesson to be drawn from the experts at this point is the curent *[sic]* inadequacy of social science to delineate with any clarity the relation between cost and quality" (Coons, Clune & Sugarman, Private Wealth and Public Education, p 30; see, also, Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L J 1303). Moreover, it is not at all clear, and, indeed, what material is available is to the contrary, that more expenditures results in increasing learning skills (Carrington, Financ-

ing the American Dream: Equality and School Taxes, 73 Col L Rev 1227, 1241-1243). The Board of Regents prescribes the educational program for the students in the State, and there is no proof in this record that any of the school district plaintiffs are acting in violation of that program in carrying out this obligation to the individual plaintiffs. Though in accordance with that program the content of the curriculum may differ among the school districts in the State, that in itself does not denote that the students in the school districts offering the narrowest curriculum are necessarily deprived, provided that such school districts comply with the basic educational program of the State. Nor does the fact that certain school districts are able to restrict class size or maintain larger staff personnel to provide ancillary or administrative services lead to the conclusion as a matter of law that the school districts unable to match the breadth of such services deny their students the benefit of the basic educational program.[2]

Leaving aside, therefore, the unproved claim of pupil deprivation, the plaintiffs are reduced to the plaint that their financial resources, based on real property assessments, do not equal the resources of other school districts. But this is a plight not derived from educational disadvantage; it is a common plight for a large number of municipal units, whether county, city, town, village, special service district, or authority. Whenever geographical area measures the unit, it follows that the value and kind of land and improvements within the unit will vary, and that equality of resources of the units (or category of units) cannot be attained, without at the same time destroying community lines.

The inequality of resources within school districts thus presumed, the claim of unequal protection of the law must therefore fail, unless we are to say that the State cannot delegate a constitutional function to municipalities except

2 Two illustrations: (1) The one-room school house in a school district may or may not provide as good instruction as another school district containing many school houses having a grade to a room, depending on the skills and dedication of the teacher and the interest of the students; (2) the access to the great museums within the City of New York enjoyed by the students in its schools may or may not be an advantage over school districts so distant from the city that their students are foreclosed from using such facilities, depending, again, on the bent of the teachers and the curiosity of the students.

by equalizing the financial burden in each municipality out of State funds. But the delegation of State functions to its municipalities and the financing of such functions out of real property taxes levied by the individual municipality is so much a part of the fundamental pattern of our government that to assert a claim of a violation of equal protection of the law, because the resources of the municipality are unequal, is at complete odds with the historical development of the law, as well as the elementary structure of State government. It cannot be said, for example, that because the financial resources of the counties of the State vastly differ, that the court function or law enforcement function within the counties may not be delegated by the State without the use of State funds, or that as a consequence a constitutional violation of equal protection of law must be implicated.[3]

Indeed, the claim in this case of an infringement of equal protection, if sustained, essentially would require that other constitutional mandates must be similarly treated. For example, the Constitution imposes the support of the needy on the State and its subdivisions, to be provided "in such manner and by such means, as the legislature may from time to time determine." (NY Const, art XVII, § 1.) Again, the same constitutional strictures are laid on the State to be discharged by the Legislature with respect to public health (NY Const, art XVII, § 3), the care of persons suffering from natural disorders (NY Const, art XVII, § 4), and public housing (NY Const, art XVIII, § 1). Thus, the argument of the plaintiffs underpinning their claim of constitutional discrimination on the ground of disparity of wealth proves too much and would, if accepted, effectively destroy the long-established governmental principle that the municipality can be expected to deal competently with State functions delegated to it (see, generally, *Robinson v Cahill*, 62 NJ 473, cert den *sub nom. Dickey v Robinson*, 414 US 976).

In addition to the general claim of unequal protection, there must be considered the claim of municipal overbur-

3. The cost of some, not all, court functions has been assumed by the State; this was a voluntary undertaking and it was never considered that the State was constitutionally required to accept that burden.

den advanced by the intervenor-plaintiffs. Municipal overburden rises to the point of constitutional discrimination in the area of education, say these plaintiffs, when the cost of that and other services furnished by them are disproportionately high, because of population characteristics and other factors beyond the control of the city, and thus cut down the amount available to be applied to general educational needs. It should be observed that municipal overburden is not uniquely a big city problem (Coons, Clune & Sugarman, Private Wealth and Public Education, pp 233-234, particularly n 20), and in the opinion of certain scholars in the field, "is important to think about but not essential to act upon, at least until we have a proper power equalizing system the operation of which can be evaluated" (*id.*, p 241) — thus making it appear that it is subsidiary to the general claim of unequal protection.

In any event, municipal overburden as a claim of discrimination is a variant of the general assertion of unequal municipal resources. It is not, again, a contention that pupils within these schools fail to receive the basic education program prescribed by the State; it is, rather, a claim that the intervenor cities, because of conditions not confronted in other municipalities, and because of the existence of other mandated services furnished to their inhabitants, are compelled to restrict the amount of appropriations for education. It is therefore a claim founded on wealth or lack of wealth of the city, not the wealth or lack of wealth of the individuals within the city. Hence, the argument of municipal overburden conforms to the claim of the other plaintiffs that their financial resources are not equal to the resources of other more fortunately located municipalities. It is beyond the power of this court in this litigation to determine whether the appropriations of the intervenor-plaintiffs have been wisely directed or reasonably applied, or whether their budgets are fairly divided in terms of priority of need between the competing services, such as police, fire, health, housing and transportation, and it is, equally, beyond the power of the court to determine whether the resources of the intervenor-plaintiffs can otherwise be employed so that their educational needs can be met.

II

In my view, accordingly, the proof of the plaintiffs has not established constitutional discrimination, no matter what test of equal protection of the law is applied. However, in any event, in the context of this case I would choose the "rationality" test.

Justice LAZER's opinion aptly and thoroughly describes the three tests of equal protection currently in vogue: the "rationality" test, the "strict scrutiny" test, and the "heightened scrutiny" test. Peculiarly, although all the tests measure the claim of unconstitutionality, each has its own factors of analysis, and the choice of the test to be applied predestines the ultimate result in almost every case. But the choice of the test itself is not determined in definable terms, and it is for that reason practically intuitive and subjective. Thus, in the words of Justice REHNQUIST, the tests often "all too readily become facile abstractions used to justify a result." (*Rostker v Goldberg*, 453 US —, —, 101 S Ct 2646, 2654.) This outcome perhaps inevitably follows whenever a decision hinges on the adoption of one of several alternative tests; it seems particularly unfortunate when constitutional issues of immense importance hang in the balance.[4] There are signs that the Supreme Court is retreating from the use of all three tests (*Rostker v Goldberg, supra*, pp —, 2658-2659 [claim of gender-based discrimination]; *Schweiker v Wilson*, 450 US 221, 230-234 [claim of mentally ill patients for Social Security benefits]; *Jones v Helms*, 452 US 412, —, 101 S Ct 2434, 2442 [claim that right to travel was violated]) to return to the standard of persons similarly situated under law receiving dissimilar treatment, a standard adhered to in the past by our courts (see, e.g., *Matter of Engelsher v Jacobs*, 5 NY2d 370, 374; *Matter of Greenburgh No. 11 Federation of Teachers v Helsby*, 41 AD2d 329, 330-331 [COOKE, J.]). Nevertheless, I am in accord with Justice

4. Diffidently, there is suggested a single test for the consideration of equal protection claims, based on these questions: (1) What was the intention of the authors of the challenged statute? (2) Does the statute in fact, or in the manner of its application, carry out that intention? (3) Are the individuals suing treated materially differently from others similarly situated by reason of the intent or the application of the statute as a matter of law or fact?

LAZER's conclusion that presently the three tests exist concurrently.

I am further in agreement that in this case no claim of fundamental constitutional right or suspect classification arises (see *Matter of Levy*, 38 NY2d 653, 658; *Lombardi v Nyquist*, 63 AD2d 1058, 1059, mot for lv to app den 45 NY2d 710). I differ from the majority in believing that the "heightened scrutiny" test (*Aleyv Downstate Med. Center of State of N.Y.*, 39 NY2d 326) must apply. I note that *Aleyv* considered a claim of reverse discrimination not involved here, and that the Court of Appeals has not demonstrated any disposition to enlarge the "heightened scrutiny" test to subsequent cases where educational legislation was the point of attack.[5]

I am instead of the opinion that the traditional test of "rationality" is the appropriate standard of review. From the beginning of the Legislature's concern with the educational needs of the State, the concept of local control linked with local taxing power has been the primary focus in designing and effectuating educational policy. Hence, in 1795 the Legislature enacted a statute appropriating $20,000 yearly for five years to be apportioned among the counties of the State "for the purpose of encouraging and maintaining schools in the several *cities and towns*", provided that the areas so benefited should raise by local taxation a sum equal to the amount so apportioned (L 1795, ch 75; emphasis supplied). In 1812 the Legislature directed that the towns were to be divided into school districts, with the imposition of a local tax optional with each town (L 1812, ch 242), but within two years the imposition of a local tax was required by the Legislature (L 1814, ch 192). Charles Lincoln concluded that "[i]t is a noteworthy feature of our school system that this policy of local supervision persisted through numerous important changes and developments" (3 Lincoln, The Constitutional History of New York, p 539).

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5. Two years after the decision in *Aleyv* the Appellate Division in *Lombardi v Nyquist* (63 AD2d 1058) held that the "rationality" test should be applied to article 89 of the Education Law, and leave to appeal was denied by the Court of Appeals (45 NY2d 710).

It is evident from the presently effective statutes that the concept of local control has continued and never been abandoned. Though the Board of Regents is empowered to establish educational policies (Education Law, § 207; cf. *Moore v Board of Regents of Univ. of State of N. Y.*, 44 NY2d 593), and the Commissioner of Education is granted the authority of enforcement of laws relating to the educational system (Education Law, § 305, subds 1, 2; § 309; cf. *James v Board of Educ.*, 42 NY2d 357), the Legislature has conferred broad and comprehensive powers on the locally elected and appointed officers of school districts to operate and maintain the schools of the State (Education Law, §§ 1604, 1709, 1805, 1903, 1950, 2503). The State has contributed to the local schools by appropriations of State aid in varying proportions throughout the years; even so, the concept of local control, in contrast to the concept of centralization, has been uniformly continued by the Legislature. The Legislature has, however, enacted certain basic standards of quality and curriculum which must be satisfied (Education Law, §§ 801-811, 3204). Beyond these basic requirements the local school districts are free to add or discontinue at their option other courses of instruction.

The concepts of home rule and local fiscal management are deeply rooted in the structure of our State government.[6] Accordingly, under the test of "rationality", the Legislature could legitimately find that school districts are proper means by which the operation and financing of schools within the State shall be accomplished (cf. *Matter of Board of Educ. v City of New York*, 41 NY2d 535). That the school districts do not possess equal potentials of taxation is inherent in the geographical compositions of the districts, as has been discussed above.

The "heightened scrutiny" test, in my mind, does not therefore apply. When the Legislature has chosen a legitimate and constitutionally recognized method to discharge a State function, it is inappropriate to inquire whether that

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6. The strength of the State's commitment to these objectives was plainly displayed in 1969 by the addition of article 52-A to the Education Law, establishing the community school district system in New York City (L 1969, chs 330, 422) and by the legislative findings in 1972 (L 1972, ch 29, § 1) which in part stated that "the decentralization of the New York city school system is an innovative experiment in education" (cf. *Matter of New York City School Bds. Assn. v Board of Educ.*, 39 NY2d 111, 119-120).

function could be achieved by another method less detrimental to the plaintiffs (cf. *Matter of Levy*, 38 NY2d 653, 658, *supra*; *Robinson v Cahill*, 62 NJ 473, 492, *supra*; *Olsen v State ex rel. Johnson*, 276 Ore 9).

III

The claim that the prevailing statutes violate the education clause of the State Constitution in my view has been established. Our Constitution calls on the Legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const, art XI, § 1.) There are several key ideas conveyed by the single sentence. First, the constitutional duty is cast on the Legislature; second, that duty includes both the maintenance and support of a system of common schools; third, the system shall be free to all children of the State.

The word "support" clearly indicates financial backing. The word "system" has large implications, and various connotations from its use can be drawn, but in the context the main lexicographical meaning seems most pertinent — that is, that a system is a whole composed of parts in orderly arrangement according to some scheme or plan; an organized scheme or plan of action; an orderly or regular method of procedure (Oxford English Dictionary [1971 ed]).[7] Cases in other jurisdictions construing similar provisions in their own Constitutions have arrived at the same meaning (see, e.g., *Kennedy v Miller*, 97 Cal 429, 432; *State ex rel. Warren v Ogan*, 159 Ind 119; *Miller v Childers*, 107 Okla 57; *Northshore School Dist. No. 417 v Kinnear*, 84 Wn 2d 685). Frank P. Graves, at one time State Commissioner of Education in New York, writing in 1947 at the time of a revision and recodification of the Education Law, said that almost from the beginning of statehood "the need was felt for *an organized and efficient* system of popular education throughout the state." (Graves, Development of the Educa-

7. More specialized definitions correspond. "A system is a group of components integrated to accomplish a purpose" (5 Encyclopedia of Education, The MacMillan Co. and the Free Press, 1971, p 583). In the same digest it is remarked that an educational system is composed of several subsidiary systems, such as the fundamental instructional system, and supportive systems, one of which is the financial system, and that a supportive system should not impose unreasonable constraints on the instructional system (*id.*, pp 583-587).

tion Law in New York, McKinney's Cons Laws of NY, Book 16, Education Law, §§ 1-600, p XIV; emphasis supplied.)

As we have seen, the first statute authorizing and encouraging the establishment of public schools granted State funds for that purpose (L 1795, ch 75), although the first constitutional command to the Legislature to maintain and support public schools was not adopted until 100 years later in the Constitution of 1894. During the intervening years, State aid had been furnished to the school districts through the common school fund and direct grants (Graves, *op. cit.*, at pp XVII-XXI), so that the language of the education article must have been selected with full knowledge and approval that State support was to be continued by the Legislature according to a *system*.

As a result of the report of the Education Finance Inquiry Commission of 1921-1924, the foundation grant came into being (Coons, Clune & Sugarman, Private Wealth and Public Education p 63). The foundation grant was so formulated that a school district would tax at a uniform rate to yield enough revenue to pay for what was considered a satisfactory offering of educational services in the richest district. Deficiencies were to be supplied by an equalization grant from the State (4 Encyclopedia of Education, The MacMillan Co. and the Free Press, 1971, p 35). Later modifications of the plan were made through the Cole-Rice Act (L 1925, ch 675) and the Friedsam formula (L 1927, ch 572), itself revised from time to time (see, e.g., L 1945, ch 579; L 1947, ch 7), which based State aid on grants made in inverse ratio to the school district's assessed valuation. By such means, the wealthier districts were limited in the receipt of State funds.

In 1962 the Legislature deserted the foundation grant plan, following a new study made by the Diefendorf Committee (Joint Legislative Committee on School Finance), and enacted a "shared-cost" program (Coons, Clune & Sugarman, *op. cit.*, pp 182-188). By 1974, when this action was commenced, other amendments had in the meantime been made to the program, the results of which most charitably can be said to represent piecemeal modifications and the enactment of special laws reaching a level of complexity so as to negate the existence of a basic State-

wide fiscal *system* for education (Mort, Unification of Fiscal Policy in New York State, in Benson, Perspectives on the Economics of Education, p 341). One of the features of the modifications made — the flat grant — clearly destroys the idea of uniform support (Coons, Clune & Sugarman, Private Wealth and Public Education, *op. cit.*, pp 186-187).

Merely a reading of the primary statutes detailing the conditions of distribution of State aid to the school districts makes clear the maze of the convoluted intricacies and provisos of the grants and that a constitutional system no longer exists. If once a uniform and integral system of State aid had been enacted, the innumerable amendments and modifications requiring payments of State aid under flat grants or hold harmless formulas, render the present plan a perversion of the constitutional mandate for a system (cf. *Seattle School Dist. No. 1 v Washington*, 90 Wn 2d 476; Chin, An Analysis and Review of School Financing Reform, 44 Fordham L Rev 773).

Book 16 of McKinney's Consolidated Laws of New York (Education Law, §§ 3001-5500) contains, in reference to section 3602 of the Education Law, the basic statute for the calculation of State aid, a total of 33 pages, covering complex definitions, involved computations, minimums, special aid formulas, ceilings, and arcane excess cost and high tax provisions; the description of the amendments to section 3602 for the years of 1963 to 1980 adds another 18 closely printed pages.[8]

The Legislature introduced in 1980 and amplified in 1981 yet another variable into the computation in the form of a State average income to be compared with the average income in each school district.

The actual operation of the statutory scheme embodied in the statutes as of 1974 is discussed at several points in Justice SMITH's opinion at Trial Term (*Board of Educ. v Nyquist*, 94 Misc 2d 466, 483-485, 503-509, *supra*) and in the majority opinion, and it is unnecessary to reiterate that

8. Of course, the 1981 amendments are not included (L 1981, ch 53). In addition to the provisions of section 3602, there are State aid provisions in sections 3603-3609 and subdivision 5 of section 1950 of the Education Law. Furthermore, there are other scattered references in the Education Law concerning fiscal considerations (e.g., Education Law, §§ 3601, 3627), as well as sometime temporary provisions in the State budgets. No attempt is made here to catalogue all such provisions.

description. However, what needs to be stressed is that the 1974 complexities have been converted into a veritable jungle of labyrinthine incongruity by the 1978 amendments, inserting the so-called "two-tier" calculation, and the 1980 and 1981 amendments, adding the new factor of the average income of residents of the school districts. What began as a simple exercise of arithmetical proportions in the distribution of State aid has been distended in the last 30 years into a prodigious task. Moreover, the conception of a system geared to the foundation grant, or aid based on the fiscal needs of the school districts in terms of their respective wealth, has disappeared under the enveloping layers of contingencies and obscurity introduced by the contradictory effect of the flat grant and save-harmless provisions. The statutes now resemble a patchwork mounted on patchwork, an Ossa of confusion piled on a Pelion of disorder. Thus, the design of a uniform and harmonious system conceived by its nineteenth century authors had been frustrated and distorted by the twentieth century attempts of legislators to satisfy the conflicting demands of their constituents.[9]

IV

For the reasons stated, I concur with the majority, but only to the extent that they find a violation of the education article of the State Constitution.

GIBBONS, J., concurs with LAZER, J.; WEINSTEIN, J., concurs in a separate opinion; HOPKINS, J. P., concurs in part and dissents in part in another opinion.

Judgment of the Supreme Court, Nassau County, dated December 22, 1978, modified, on the law and the facts (1) by deleting the final three sentences from decretal paragraph 1(a) and substituting the following: "The system presently impinges upon the important right of education

9. The New Jersey Supreme Court found similarly that the then current legislative provisions violated the education clause in the New Jersey Constitution (*Robinson v Cahill*, 62 NJ 473). The only difference between the New Jersey constitutional provision and the New York constitutional article is that in New Jersey the State Constitution directs the Legislature to "provide for the maintenance and support of a thorough and efficient system" (NJ Const, art VIII, § 4, par 1.) The adjectives in my view are redundant and do not enlarge the meaning of system (cf. *Seattle School Dist. No. 1 v Washington*, 90 Wn 2d 476, *Board of Educ. v Walter*, 58 Ohio St 2d 368; *Olsen v State ex rel. Johnson*, 276 Ore 9).

guaranteed to all children of this State by section 1 of article XI of the New York Constitution in the plaintiff and intervenor-plaintiff school districts. The system fails to further the asserted State interest of preserving local control over education in these districts. It also fails because there are methods of financing public school education which would further local control over education with less intrusion upon the right of education guaranteed to all children of the State. Accordingly, New York's public school finance system violates the equal protection clause of the New York State Constitution (art I, § 11)"; (2) by deleting from the penultimate sentence of decretal paragraph 1(c) the words "and irrational"; and (3) by deleting from the final sentences of decretal paragraphs 1(c), 1(d) and 1(e) the words "and of the Federal Constitution (the Fourteenth Amendment)" and substituting the following declaration: "New York's school financing system is constitutional under the Fourteenth Amendment to the Constitution of the United States." As so modified, judgment affirmed, without costs or disbursements.

Order of the Appellate Division, Second Department, dated October 26, 1981

JAMES D. HOPKINS, J.P.
LEON D. LAZER
DAVID T. GIBBONS
MOSES M. WEINSTEIN, JJ.

___ AD2d ___ A—April 7, 1980

2966 E/80

Board of Education, Levittown Union Free School District, Nassau County, et al., plaintiffs-respondents-appellants; Board of Education, City School District, Rochester, New York, et al., plaintiffs-intervenors-respondents, v. Ewald B. Nyquist, Commissioner of Education, et al., defendants-appellants-respondents.

Robert Abrams, Attorney-General, New York, N.Y. (Shirley Adelson Siegel, solicitor general; Amy Juviler, Rosalind S. Fink, Robert L. Schonfeld, Clement H. Berne and Evelyn Tenenbaum, of counsel), for defendants-appellants-respondents.

Kramer, Lowenstein, Nessen, Kamin & Soll, New York, N.Y. (Daniel P. Levitt and Alan Jay Stein, of counsel), for plaintiffs-respondents-appellants.

John Silard, Joseph L. Rauh, Jr., Elliott C. Lichtman and Mary M. Levy, Rauh, Silard and Lichtman, Washington, D.C. for plaintiffs-intervenors-respondents. (Adam Kaufman, Counsel for Rochester Board of Education, Allen G. Schwartz, New York City Corporation Counsel, by James G. Greilsheimer and Doron Gopstein; David M. Garber, Syracuse Corporation Counsel; and Joseph P. McNamara, Buffalo Corporation Counsel).

Shearman & Sterling, New York, N.Y. (Wayne D. Collins, William M. Kelly and Dennis P. Orr, of counsel), for the Public Education Association, the New York Urban Coalition, and the City Club of New York, *amici curiae*.

Judgment of the Supreme Court, Nassau County (SMITH, J.), dated December 22, 1978, modified, on the law and the facts, (1) by deleting the final three sentences from decretal paragraph 1 (a) and substituting the following: "The system presently impinges upon the important right of education guaranteed to all children of this State by section 1 of article XI of the New York Constitution in the plaintiff and intervenor-plaintiff school districts. The system fails to further the asserted State interest in preserving local control over education in these districts. It also fails because there are methods of financing public school education which would further local control over education with less intrusion upon the right of education guaranteed to all children of the State. Accordingly, New York's public school finance system violates the equal protection clause of the New York State Constitution (art I, § 11)"; (2) by deleting from the penultimate sentence of decretal paragraph 1 (c) the words "and irrational"; and (3) by deleting from the final sentence of decretal paragraphs 1 (c), 1 (d) and 1 (e) the words "and of the Federal Constitution (the Fourteenth Amendment)" and substituting the following declaration: "New York's school financing system is constitutional under the Fourteenth Amendment to the Constitution of the United States." As so modified, judgment affirmed, without costs or disbursements.

OPINION by LAZER, J.

GIBBONS and WEINSTEIN, JJ., concur in the opinion of Justice LAZER, WEINSTEIN, J., with a separate concurring opinion.

HOPKINS, J.P., concurs in part and dissents in part, with an opinion.

Judgment of the Appellate Division, Second Department, dated October 26, 1981

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 8208/74

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, et al.,

Plaintiffs,

BOARD OF EDUCATION, CITY SCHOOL DISTRICT ROCHESTER, NEW YORK, et al.,

Plaintiffs-Intervenors,

—against—

EWALD B. NYQUIST, Commissioner of Education, et al.,

Defendants.

JUDGMENT

The issues in this action, which is for a Judgment declaring unconstitutional New York's system for financing the State's public elementary and secondary schools, having duly come on to be heard before Justice L. Kingsley Smith, without a jury at Trial Term, Part 4 of this Court on the 21st day of April, 1976, and the issues having been tried, and the plaintiffs having appeared by Kramer, Lowenstein, Nessen, Kamin & Soll, Esqs., their attorneys, the plaintiffs-intervenors having appeared by Rauh, Silard & Lichtman, Esqs., their attorneys, and the defendants having appeared by the Attorney General of the State of New York, their attorney, and the proofs of all parties having been adduced and their respective counsel hav-

ing been heard, and all parties having submitted requests for findings of fact pursuant to CPLR § 4213(a), and the Court having duly deliberated upon the proofs adduced at trial and passed upon each request for findings of fact submitted by the parties, rejecting those that were redundant, not founded in the record, or irrelevant to the issues, and modifying those requiring modification, and the Court having rendered its Decision in writing in favor of the plaintiffs and the plaintiffs-intervenors on June 23, 1978, which Decision directs the parties to settle a Judgment declaring unconstitutional the existing public school finance system of the State of New York, and the Court having denied the defendants' motion to reconsider by memorandum decision of even date herewith.

Now, on motion of plaintiffs and plaintiffs-intervenors, it is

Adjudged and Decreed That:

1. New York's system for financing public elementary and secondary education is hereby declared unconstitutional in that:

a. The Legislature has created a public school finance system wherein the level of expenditure and the consequent availability of educational resources in the State's public elementary and secondary schools are largely a function of the amount of property wealth per child that happens to be located within the boundaries of the various school districts, which have unequal access to taxable real property wealth. This circumstance discriminates against property-poor school districts, those who pay property tax in such school districts and children who attend public elementary and secondary school in them. The system presently impinges upon the important right of education guaranteed to all children of this State by Section 1 of Article XI of the New York Constitution in the plaintiff and plaintiff-intervenor school districts. The system fails to further the asserted State interest in preserving local control over education in these districts. It also fails because there are methods of financing public school education which would further local control over education with less intrusion upon

the right of education guaranteed to all children of the State. Accordingly, New York's public school finance system violates the equal protection clause of the New York State Constitution (art I, § 11).

b. In failing adequately to recognize the varying capabilities of districts to raise educational funds through taxes levied on widely disparate real property tax bases and to correct for those disparities through the distribution of state aid, the system of state aid for primary and secondary education is not sufficient to satisfy the State's primary constitutional obligation to provide for "the maintenance and support of a system of free common schools wherein all the children of the state may be educated." Accordingly, New York's public school finance system violates the education article of the State Constitution (Article XI, Section 1).

c. A major purpose underlying state aid for public education in New York, historically and under Chapter 241 of the 1974 Laws, has been to equalize the varying capabilities of the State's school districts to finance public education. While the aid statute purports to accord equal treatment to all school districts, it fails to give effect to certain overburdening conditions that affect four of the State's five largest cities and the schools located within their boundaries. Specifically, the aid formula:

(1) Disregards the "municipal overburden" drain on these cities' tax dollars caused by the need to provide an enormous amount of non-educational services;

(2) Disregards the diminished power of the urban dollar in purchasing educational resources as a result of the higher cost factors found in the cities;

(3) Disregards the increased school costs caused by the far higher rates of student absenteeism prevailing in these city school districts and actually penalizes the city school districts for their higher student absenteeism;

(4) Fails to take adequate account of the increased costs arising from the far greater concentrations and numbers of disadvantaged, handicapped and other students with special needs, and actually provides reduced and below average state aid supplements for such students in these city districts except Buffalo.

The result of the state aid formula's failure to give effect to these overburdening factors is an overstatement of the city districts' capacity to finance public education and an arbitrary deprivation of state aid. Accordingly, New York's school finance system violates the equal protection clause of the State Constitution (Article I, Section 11). New York's school financing system is constitutional under the Fourteenth Amendment to the Constitution of the United States.

d. These four large city school districts have the most difficult and most expensive school populations to educate. But with the largest concentrations of disadvantaged children requiring expensive compensatory education they are unable to meet their needs from local revenue sources; yet the statutory aid formula largely disregards their unique education overburdens. The aid formula denies equal educational opportunity and equal treatment to children in these city school districts when it fails to give fair and adequate consideration to their special and severe educational overburdens. Accordingly, New York's school finance system violates the education article of the State Constitution (Article XI, Section 1) and the equal protection clause of the State Constitution (Article I, Section 11). New York's school financing system is constitutional under the Fourteenth Amendment to the Constitution of the United States.

e. Because these four city school districts serve unparalleled concentrations of disadvantaged school children more difficult and expensive to educate, but do not have either local or state educational resources to meet that need, educational performance in city school districts is severely depressed. Many

pupils fail to acquire basic minimal educational skills while attending schools in those districts, and even more fail to achieve minimum levels of competence as measured by state standards. In its restriction of aid to these city districts and its disregard of their educational burdens the aid statute denies such children equal opportunity to acquire basic minimal educational skills. Accordingly, New York's public school finance system violates the education article of the State Constitution (Article XI, Section 1) and the equal protection clause of the State Constitution (Article I, Section 11). New York's school financing system is constitutional under the Fourteenth Amendment to the Constitution of the United States.

2. The use of local school districts in providing a system of free public schools does not violate the Constitutions of the State of New York or of the United States.

3. The use of locally imposed real property taxes to support a system of free public schools or for other governmental purposes does not violate the Constitutions of the State of New York or of the United States.

4. This Judgment shall have prospective operation only. The declaration of the rights of the parties contained herein shall not prevent the continued operation of the State's public school finance system under existing statutes, until such time as those statutes are changed by legislative action or operations under them are specifically enjoined by the Court. Notwithstanding any of the foregoing terms or provisions hereof, nothing herein shall be deemed to limit, impair or affect any bonds heretofore or hereafter issued or authorized for public school purposes, or any notes or other obligations at any time authorized or issued in anticipation of such bonds, or any taxes levied or required to be levied with respect to any such bonds, notes or other obligations (all herein called "obligations"), or the expenditure or other application of proceeds of any such taxes or obligations; and for so long as any of such obligations shall remain unpaid as to any principal or interest, nothing

herein contained or done pursuant hereto shall be applied or construed to affect the validity or binding effect of such obligations, the creation or legal existence of the issuer thereof, or shall, in the event any of such obligations shall not be paid as to principal or interest when due, invalidate, modify or otherwise affect the meaning or legal effect of any laws or statutes of this State in effect at time of issuance of such obligations relating to the assessment, levy or collection hereafter and the application of property taxes to pay such principal or interest or judgments therefor or relating to the enforcement and payment of any such obligations or judgments and interest thereon.

5. The Court will retain jurisdiction of this action for a reasonable period of time to afford the Legislature an opportunity to enact legislation providing for a public school finance system which does not violate either the State Constitution or the Federal Constitution. In the event the Legislature fails to act within a reasonable period of time to remedy the constitutional defects present in the system of public school finance, plaintiffs and/or plaintiffs-intervenors may apply to this Court, on notice to all other parties, for such other and further relief against the defendants or their successors, including injunctive relief, as may be necessary or appropriate to provide them with a complete remedy.

6. Defendants have moved for reconsideration of this Court's Decision on the ground that recent legislative enactments have rectified all but one of the unconstitutional inequities of the State's system of school finance described in the Decision. The Court has carefully reviewed the statutes cited, and denies defendants' motion because none of the statutory changes materially affect the rulings of unconstitutionality set forth in the Decision and in the above paragraphs of this Judgment.

7. No party shall have the costs and disbursements of this action as against any other party.

ENTER,

_____

J.S.C.

Judgment signed December 22, 1978 as amended by the Appellate Division, Second Department by Judgment dated October 26, 1981.

Findings of Fact of the Appellate Division, Second Department, dated October 26, 1981

The following constitute this court's findings of fact divided into separately numbered groupings as they pertain to the original plaintiffs and the plaintiffs intervenors. Although appended to the majority opinion, the findings have received the concurrence of all members of the bench.

Bracketed matter indicates findings or material appearing in Trial Term's findings of fact which have been deleted by this court. Italicized matter indicates modification by this court. Trial Term's original numbering system has been retained, with deletions from the consecutive numbering made by Trial Term appropriately noted. Throughout the findings, the abbreviation OFF represents a finding of fact relating to the original plaintiffs and IFF a finding relating to the plaintiffs intervenors. Page references preceded by a roman numeral represent the page in the joint appendix on which the cited transcript material may be found.

FINDINGS OF FACT*

I. The Plaintiffs.

1. Each of the 27 plaintiff school districts is represented in this action by its board of education.

a. Levittown Union Free School District is located in Nassau County, in the Town of Hempstead. In 1974-1975 Levittown, a large district with weighted average daily attendance (WADA) of 14,419, had a full value per resident WADA (RWADA) of $30,568, making it the poorest of the county's 56

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* For purposes of these [proposed] findings, all references to schools or school finance are to New York's public elementary and secondary schools, unless otherwise indicated. And all statistics are, unless otherwise indicated, for the 1974-75 school year. Many of the technical terms, such as full value and WADA, are used as defined in [Appendix A herein] *the attached glossary.*

districts, and levied a total tax rate of $27.86 *per thousand dollars of equalized assessed valuation,* one of the highest rates in the county. Operating expenditures per WADA were $1,894, sixteenth lowest in the county, and its ratio of professional staff per 1,000 WADA was 58.3, *the* thirteenth lowest in the county. (PX-28,29) (II 691-693, 758-760) Levittown is primarily a residential community of small homes and the district has no industry or large utilities. (Tr. 308) (III 871a-72).

In 1979, the district had a full value per 1979-1980 TWPU of $51,083, the second poorest of the 56 districts in the county. In 1980-1981, it had a full value tax rate of $30.49, the third highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $28,333, the ninth poorest in the county. Its approved operating expenses per TAPU for 1980-1981 were $3,372, the twenty-first poorest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 77.0, the thirty-fifth lowest in the county.

b. Roosevelt Union Free School District is located in Nassau County, in the unincorporated area *known as* [of] Roosevelt. In 1974-1975 the district had a full value per RWADA of $31,908, making it the second poorest district in the county, and a total tax rate of $29.47, one of the highest rates. Operating expenditures per WADA (4294) were $1,862 and its ratio of professional staff per 1,000 WADA was 62.4 (PX-28, 29) (II 691-693, 758-60). The one mile square district is composed almost entirely of single-family residential property and has no industry and little commerce, apart from a few small stores on the main street. The population of 18,000 is predominantly black. (Tr. 3058-60) (IV 1837-38).

In 1979, the district had a full value per 1979-1980 TWPU of $42,096, the poorest of the 56 districts in the county. In 1980-1981, it had a full value rate of $27.10, the twenty-second highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $14,126, the lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,325.91, the lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 69.1, the twelfth lowest in the county.

c. Brentwood Union Free School District is located in Suffolk County, [with]in the Town of Islip. In 1974-1975 the district had a full value per RWADA of $23,583, making it the poorest of the county's 65 districts, and a total tax rate of $26.02.

Operating expenditures per WADA were $1,609 and its ratio of professional staff per 1,000 WADA was 54.5. (PX-28, 29) (II 714, 779). The district is primarily residential, with relatively inexpensive homes, and very little industrial or commercial property. (Tr. 984) (III 1140) Brentwood is the largest school district on Long Island with WADA of 21,479, and the largest in the State outside of the five larges*t* cities.

In 1979, the district had a full value per 1979-1980 TWPU of $34,804, the poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $33.09, the thirteenth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $14,277, the fifth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,818.29, the nineteenth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 64.3, the twenty-fifth lowest in the county.

d. Commack Union Free School District is located in Suffolk County. In 1974-1975 the district, the eighth poorest in the county, had a full value per RWADA of $30,018 and a total tax rate of $31.42, highest in the county. Operating expenditures per WADA (15,301) were $1,813 and its ratio of professional staff per 1,000 WADA was 57.2. (PX-28, 29) (II 712, 781)

In 1979, the district had a full value per 1979-1980 TWPU of $54,625, the twenty-second poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $33.04, the fourteenth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $22,003, the thirteenth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $3,481, the forty-ninth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 64.9, the twenty-eighth lowest in the county.

e. Brookhaven-Comsewoque Union Free School District is located in Suffolk County. In 1974-1975 the district had a full

value per RWADA of $32,276 and a total tax rate of $31.31, second highest in the county. Operating expenditures per WADA (5761) were $1,763 and its ratio of professional staff per 1,000 WADA was 55.5 (PX-28, 29) (II 713, 780)

In 1979, the district had a full value per 1979-1980 TWPU of $44,319, the eighth lowest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $30.98, the nineteenth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $16,625, the twelfth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,502.73, the seventh lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 60.4, the twelfth lowest in the county.

f. Copiague Union Free School District is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $36,006 and a total tax rate of $25.27. Operating expenditures per WADA (6125) were $1,630 and its ratio of professional staff per 1,000 WADA was 52.9 (PX-28, 29) (II 713, 780)

In 1979, the district had a full value per 1979-1980 TWPU of $51,094, the fifteenth poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $28.55, the thirty-fourth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $16,219, the tenth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,619, the tenth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 60.5, the thirteenth lowest in the county.

g. Middle Country Central School District at Centereach is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $26,716, making it the third poorest district in the county, and a total tax rate of $29.15. Operating expenditures per WADA (17,104) were $1,614 and its ratio of professional staff per 1,000 WADA was 53.6. (PX-28, 29) (II 713, 780)

In 1979, the district had a full value per 1979-1980 TWPU of $37,002, the third poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $32.79, the fifteenth highest in the county. In 1979 taxable personal income per

1979-1980 TWPU was $13,992, the fourth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,857, the twenty-second lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 64.0, the twenty-fourth lowest in the county.

h. South Country Central School District of Brookhaven Town is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $39,216 and a total tax rate of $26.79. Operating expenditures per WADA (4316) were $1,695 and its ratio of professional staff per 1,000 WADA was 62.5. (PX-28, 29) (II 713, 780)

In 1979, the district had a full value per 1979-1980 TWPU of $48,526, the thirteenth poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $28.84, the thirtieth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $12,947, the third lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,509.51, the eighth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 66.3, the thirty-second lowest in the county.

i. Lindenhurst Union Free School District is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $31,270 and a total tax rate of $26.30. Operating expenditures per WADA (10,732) were $1,629 and its ratio of professional staff per 1,000 WADA was 53.8. (PX-28, 29) (II 713, 780)

In 1979, the district had a full value per 1979-1980 TWPU of $44,641, the ninth poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $30.72, the twenty-first highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $24,004, the thirty-fifth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,781, the fifteenth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 62.1, the nineteenth lowest in the county.

j. Bayport-Blue Point Union Free School District is located in Suffolk County. In 1974-1975 the district had a full value per

RWADA of $36,416 and a total tax rate of $26.04. Operating expenditures per WADA (3453) were $1,745 and its ratio of professional staff per 1,000 WADA was 60.2. (PX-28, 29) (II 714, 781)

In 1979, the district had a full value per 1979-1980 TWPU of $52,933, the nineteenth poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $34.06, the ninth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $23,451, the thirty-fourth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,915, the twenty-seventh lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 69.0, the thirty-seventh lowest in the county.

k. South Huntington Union Free School District is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $41,922 and a total tax rate of $30.44. Operating expenditures per WADA (11,015) were $1,939 and its ratio of professional staff per 1,000 WADA was 58.6. (PX-28, 29) (II 712, 781)

In 1979, the district had a full value per 1979-1980 TWPU of $69,967, the thirty-third poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $50.82, the twentieth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $17,145, the fourteenth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $3,487, the fiftieth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 65.2, the twenty-ninth lowest in the county.

l. Sachem Central School District at Holbrook is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $34,902 and a total tax rate of $22.17. Operating expenditures per WADA (17,706) were $1,427 and its ratio of professional staff per 1,000 WADA was 60.7. (II 713, 780)

In 1979, the district had a full value per 1979-1980 TWPU of $42,916, the seventh poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $27.58, the fortieth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $16,046, the ninth lowest in the county.

Its approved operating expenses per TAPU for 1980-1981 were $1,410, the fifth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 57.2, the fifth lowest in the county.

m. East Islip School District is located in Suffolk County. In 1974-1975 the district had a full value per RWADA of $29,938 and a total tax rate of $27.08. Operating expenditures per WADA (7679) were $1,627 and its ratio of professional staff per 1,000 WADA was 51.8. (PX-28, 29) (II 712, 781)

In 1979, the district had a full value per 1979-1980 TWPU of $46,446, the eleventh poorest of the 65 districts in the county. In 1980-1981, it had a full value tax rate of $33.16, the twelfth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $20,343, the twenty-first lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,939, the twenty-ninth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 56.0, the second lowest in the county.

n. Lakeland Central School District is located in Westchester County. In 1974-1975 the district had a full value per RWADA of $36,972, making it the second poorest of the county's 40 districts, and a total tax rate of $28.30. Operating expenditures per WADA (8826) were $1,748, fifth lowest in the county, and its ratio of professional staff per 1,000 WADA was 58.1, fifth lowest in the county. (PX-28, 29) (II 724, 785)

In 1979, the district had a full value per 1979-1980 TWPU of $62,537, the second poorest of the 40 districts in the county. In 1980-1981, it had a full value tax rate of $30.28, the sixth highest in the county. In 1979, taxable personal income per 1979-1980 TWPU was $19,649, the second lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $3,226, the ninth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 71.3, the eleventh lowest in the county.

o. Mahopac Central School District is located in Putnam County. In 1974-1975 the district had a full value per RWADA of $42,576 and a total tax rate of $27.70. Operating expendi-

tures per WADA (6136) were $1,736 and its ratio of professional staff per 1,000 WADA was 50.2. Mahopac is the largest, poorest, most highly taxed and most thinly staffed district in its county. (PX-28, 29) (II 702, 769)

In 1979, the district had a full value per 1979-1980 TWPU of $65,543, the poorest of the six districts in the county. In 1980-1981, it had a full value tax rate of $29.78, the second highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $21,824, the lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $3,136, the highest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 54.2, the lowest in the county.

p. Guilderland Central School District is located in Albany County. In 1974-1975 the district had a full value per RWADA of $39,437, fourth poorest in the county, and a total tax rate of $21.65, the second highest. Operating expenditures per WADA (5904) were $1,666 and its ratio of professional staff per 1,000 WADA was 59.8. (II 663, 729)

In 1979, the district had a full value per 1979-1980 TWPU of $65,023, the fifth poorest of the 13 districts in the county. In 1980-1981, it had a full value tax rate of $20.04, the fourth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $31,038, the fifth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,403, the ninth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 67.9, the fifth lowest in the county.

q. Burnt Hills-Ballston Lake Central School District is located in Saratoga and Schenectady Counties, partly within the Town of Glenville. In 1974-1975 the district had a full value per RWADA of $29,445 and a total tax rate of $18.98. Operating expenditures per WADA (5492) were $1,312 and its ratio of professional staff per 1,000 WADA was 54.3. (PX-28, 29) (II 706, 773) The district is primarily suburban in its southern half, becoming rural in the north. It is a residential community,

having no manufacturing facilities and a small commercial center. (Tr. 1665-66) (IV 1386-87)

In 1979, the district had a full value per 1979-1980 TWPU of $50,899, the eighth poorest of the 11 districts in Saratoga County. In 1980-1981, it had a full value tax rate of $19.45, the third highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $26,215, the ninth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,425.36, the eleventh highest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 61.6, the sixth lowest in the county.

r. Enlarged City School District of the City of Saratoga Springs is located in Saratoga County. In 1974-1975 the district had a full value per RWADA of $35,844 and a total tax rate of $18.07. Operating expenditures per WADA (6572) were $1,280 and its ratio of professional staff per 1,000 WADA was 56.3. (PX-28, 29) (II 706, 773)

In 1979, the district had a full value per 1979-1980 TWPU of $58,190, the second richest in the county. In 1980-1981, it had a full value tax rate of $16.12, the third lowest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $21,419, the seventh lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $1,800, the second lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 59.7, the fourth lowest in the county.

s. Shenendehowa Central School District at Elnora is located in Saratoga County. In 1974-1975 the district had a full value per RWADA of $29,302 and a total tax rate of $13.68. Operating expenditures per WADA (9616) were $1,128 and its ratio of professional staff per 1,000 WADA was 52.3, second smallest in its county. (PX-28, 29) (II 706, 773)

In 1979, the district had a full value per 1979-1980 TWPU of $50,081, the sixth poorest of the 11 districts in the county. In 1980-1981, it had a full value tax of $15.35, the lowest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $23,751, the eighth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,004, the

fourth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 57.4, the lowest in the county.

t. Scotia-Glenville Central School District is located in Schenectady County. In 1974-1975 the district had a full value per RWADA of $35,192 and a total tax rate of $19.08. Operating expenditures per WADA (4218) were $1,422 and its ratio of professional staff per 1,000 WADA was 55.0. (PX-28, 29) (II 707, 774)

In 1979, the district had a full value per 1979-1980 TWPU of $57,384, the third poorest of the seven districts in the county. In 1980-1981, it had a full value tax rate of $20.26, the third highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $32,317, the sixth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,273, the fourth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 62.5, the second lowest in the county.

u. Schenectady City School[s] District is located in Schenectady County. In 1974-1975 the district had a full value per RWADA of $48,359 and a total tax rate of $20.73. Operating expenditures per WADA (11,327) were $1,505 and its ratio of professional staff per 1,000 WADA was 65.5. (PX-28, 29) (II 707, 774)

In 1979, the district had a full value per 1979-1980 TWPU of $66,777, the fifth poorest of the seven districts in the county. In 1980-1981, it had a full value tax rate of $20.16, the fourth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $32,098, the fifth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,308, the second highest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 70.9, the second highest in the county.

v. Churchville-Chili Central School District is located in Monroe County. In 1974-1975 the district had a full value per RWADA of $32,510 and a total tax rate of $21.63. Operating expenditures per WADA (4347) were $1,253 and its ratio of

professional staff per 1,000 WADA was 51.3. The district is the third poorest of 18 in the county, and the most thinly staffed. (PX-28, 29) (II 689, 755)

In 1979, the district had a full value per 1979-1980 TWPU of $50,344, the third poorest of the 18 districts in the county. In 1980-1981, it had a full value tax rate of $21.49, the tenth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $26,947, the fifth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,226, the fourth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 53.4, the lowest in the county.

w. Marathon Central School District is located in Cortland County. In 1974-1975 the district had a full value per RWADA of $23,919 and a total tax rate of $12.27. Operating expenditures per WADA (1149) were $1,111 and its ratio of professional staff per 1,000 WADA was 51.3. Marathon is its county's poorest and most thinly staffed district. (PX-28, 29) (II 673, 739)

In 1979, the district had a full value per 1979-1980 TWPU of $41,949, the poorest of the five districts in the county. In 1980-1981, it had a full value tax rate of $17.42, the second highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $13,589, the third lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $1,794.39, the second lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 59.1, the lowest in the county.

x. South Kortright Central School District is located in Delaware County. In 1974-1975 the district had a full value per RWADA of $36,760, fifth poorest in the county, and a total tax rate of $16.04, the second highest. Operating expenditures per WADA (618) were $1,296 and its ratio of professional staff per 1,000 WADA was 63.1. (PX-28, 29) (II 674, 740)

In 1979, the district had a full value per 1979-1980 TWPU of $77,655, the seventh poorest of the 12 districts in the county. In 1980-1981, it had a full value tax rate of $16.33, the third

highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $13,893, the third lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,216, the second highest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 74.2, the seventh lowest in the county.

y. Clyde Savannah Central School District is located in Wayne County. In 1974-1975 the district had a full value per RWADA of $21,224, second poorest in the county, and a total tax rate of $19.54. Operating expenditures per WADA (1669) were $1,253 and its ratio of professional staff per 1,000 WADA was 57.5. (PX-28, 29) (II 722, 788)

In 1979, the district had a full value per 1979-1980 TWPU of $40,202, the fifth poorest of the 11 districts in the county. In 1980-1981, it had a full value tax rate of $19.33, the sixth highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $16,976, the third lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,140, the sixth lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 71.7, the third highest in the county.

z. Knox Memorial Central School District is located in St. Lawrence County. In 1974-1975 the district had a full value per RWADA of $17,924 and a total tax rate of $14.01. Operating expenditures per WADA (609) were $1,410 and its ratio of professional staff per 1,000 WADA was 67.2. (PX-28, 29) (II 705, 722)

In 1979, the district had a full value per 1979-1980 TWPU of $36,487, the ninth poorest of the 18 districts in the county. In 1980-1981, it had a full value tax rate of $16.97, the eleventh highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $9,125, the second lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $1,989, the eleventh lowest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 83.0, the second highest in the county.

aa. Buffalo City School District, both an original plaintiff and an intervenor, is located in Erie County. In 1974-1975 the district had a full value per RWADA of $39,188 and a total tax rate of $20.21. Operating expenditures per WADA (56,977) were $1,578 and its ratio of professional staff per 1,000 WADA was 66.4. (PX-28, 29) (II 742)

In 1979, the district had a full value per 1979-1980 TWPU of $54,488, the tenth poorest of the 28 districts in the county. In 1980-1981, it had a full value tax rate of $17.78, the eleventh highest in the county. In 1979 taxable personal income per 1979-1980 TWPU was $28,708, the eighteenth lowest in the county. Its approved operating expenses per TAPU for 1980-1981 were $2,349, the ninth highest in the county. In 1979-1980 the professional staff per 1,000 enrolled pupils was 74.7, the highest in the county.

2. The individual plaintiffs are:

a. Gerri Lynn Grau, an infant, who attends public school in the Levittown School District in Nassau County. She appears by Herman Grau, her parent and natural guardian. (Cplt. ¶ 8(a))

b. Joanne Maturo, an infant, who attends public school in the Commack School District in Suffolk County. She appears by Dominick Maturo, her parent and natural guardian. (Cplt. ¶ 8(b))

c. Sean Sanborn, an infant, who attends public school in the South Huntington School District in Suffolk County. He appears by Jay Sanborn and Mary Ann Sanborn, his parents and natural guardians. (Cplt. ¶ 8(c))

d. Suzanne McKenna, an infant, who attends public school in the Bayport-Blue Point School District in Suffolk County. She appears by John McKenna and Angela McKenna, her parents and natural guardians. (Cplt. ¶ 8(d))

e. Jane McKenna, an infant, who attends public school in the Bayport-Blue Point School District in Suffolk County. She

appears by John McKenna and Angela McKenna, her parents and natural guardians. (Cplt. ¶ 8(e))

f. Mark McKenna, an infant, who attends public school in the Bayport-Blue Point School District in Suffolk County. He appears by John McKenna and Angela McKenna, his parents and natural guardians. (Cplt. ¶ 8(f))

g. Karen McKenna, an infant, who attends public school in the Bayport-Blue Point School District in Suffolk County. She appears by John McKenna and Angela McKenna, her parents and natural guardians. (Cplt. ¶ 8(g))

h. Walter Howard, Jr., an infant, who attends public schools in the Schenectady City Schools in Schenectady County. He appears by Barbara L. Howard, his parent and natural guardian. (Cplt. ¶ 8(h))

i. Mary Beth Selee, an infant, who attends public school in the Guilderland Central School District in Albany County. She appears by Donald Selee, her parent and natural guardian. (Cplt. ¶ 8(i))

j. Robert Selee, an infant, who attends public school in the Guilderland Central School District in Albany County. He appears by Donald Selee, his parent and natural guardian. (Cplt. ¶ 8(j))

k. John M. Collins, Jr., an infant, who attends public school in the Schenectady City Schools in Schenectady County. He appears by John M. Collins, his parent and natural guardian. (Cplt. ¶ 8(k))

l. Simone Wynn, an infant, who attends public school in the Roosevelt School District in Nassau County. She appears by Prathis Wynn and Ralph Wynn, her parents and natural guardians. (Cplt. ¶ 8(l))

OFF 3 and 4 deleted by Trial Judge.

IV. THE STATUTORY SCHEME:

A. Historical Antecedents

5. Arvid J. Burke, called by the intervenors, testified about the history of the New York school finance system. He gave the following background:

a. New York first adopted a law creating the common school system in 1812, and in the same year established a procedure for dividing the state into some 11,000 one or two-teacher school districts, each about two miles square. Monies from interest on a common school fund were distributed by the State to towns and districts on the basis of population. Because population was increasing faster than the State's rate of return on the school fund, the amount of money available per pupil decreased over the years. As a result, districts were increasingly forced to charge parents tuition for the privilege of sending their children to public school. (Tr. 10,870-10,878, VIII 3937-41; Tr. 10,885, VIII 3946; Tr. 10,865, VIII 3934)

b. In 1851 the Legislature enacted a statewide property tax and passed an $800,000 fixed appropriation to finance the schools. The appropriation was distributed on the basis of a district quota—essentially a flat grant. The year following enactment of this legislation, the State provided 52 per cent of total school expenditures. The property tax remained in effect until repealed in 1901. (Tr. 10,882, 10,890) (VIII 3944-45, 3949)

c. In 1867 the Legislature adopted the Free School Act, prohibiting tuition in public schools. Attendance had become compulsory in 1853. (Tr. 10,889, 10,930) (VIII 3949, 3965)

d. The so-called Cole-Rice Law of 1925 adopted the foundation system that for all practical purposes remains in effect today, although the numbers have changed and some of the categories are renamed. It was in 1925 that every district was guaranteed a minimum amount of State aid per pupil (originally calculated in "teacher" units of 27) based upon average daily attendance. [And f] *F*ull valuation of property, on an

equalized basis, became the determinant of a district's fiscal capacity. (Tr. 10,893) (VIII 3952) As the legislative history shows, the 1925 legislation was an attempt to equalize both educational opportunities throughout the State and tax burdens as they fell upon individual school districts. (Tr. 10,902-10,903; IX-175 and 176) (VIII 3953-55 VIII 4002, 4012)

e. The so-called Diefendorf Formula, adopted in 1962, was an effort to correct inequities arising under the 1925 law. Certain benefits that had been denied to large cities, like transportation and building aid, were extended to the cities. [And b] *B*ecause the State aid formula was not self-adjusting—State aid diminished as property valuations increased—the Legislature enacted a State aid ratio intended to keep pace with increasing property valuations. (Tr. 10,910-10,912) (VIII 3958-60)

B. The 1974 Legislation

6. In 1974, in response to a wide consensus of opinion that Diefendorf had not remedied the inequities present in the school finance formula, the Legislature adopted an interim law avowedly intended to serve only for a year or two until a permanent revision in the school finance system could be accomplished. (Polley Tr. 14,982; see, also Wilson Tr. 15,630, 15639) (X 4872, X 5024, 5027)

7. *Among the* [E] *e*ssential features of the 1974 legislation [which still apply today are as follows] *were these*:

a. Each district [is] *was* entitled to State assistance to raise $1,200 per pupil (on an "aidable pupil unit" or APU basis rather than on per WADA) by imposition of a 15 mill tax on its own tax base. To the extent that this hypothetical 15 mill levy would not raise $1,200 in a district, the State [supplies] *supplied* the difference. As originally enacted, the 1974 legislation contained incentives to induce districts to impose a tax rate of at least 15 mills, but these provisions were not enforced and have since been deleted. (Polley Tr. 14,864-866) (X 4813-15)

Each district is now entitled to State assistance to raise $1,650 per weighted pupil by imposition of an 11.57 mill tax on its full value tax base. To the extent that this levy would not raise $1,650 in a district, the State supplies the difference. This formula has been made self-adjusting so that if real property values continue to rise, a continually lower tax rate will yield the local district's share of the $1,650 per APU. In addition, if a district has personal income wealth per pupil (TWPU) of less than 125% of the State average, the district will receive aid under an aid ratio generated by the second tier of the operating aid formula. Due to the fact that Tier 2 aid is based on income wealth, the tax rate necessary to generate $1,885 (the second tier ceiling) from State and local sources will vary (L 1981, ch 53, §§ 13, 17, 24, 25; L 1980, ch 53, §§ 6, 8-9, 11-13, 15; Education Law, § 3602, subd 1, pars d, i., subd 2, par g, subds 2-a, 2-b, 3, 8, 9, 11, 12; I 476-479.)

b. For purposes of determining the pupil count for distribution of aid, half-day kindergarten students are counted at 0.5 their actual number, elementary students are counted at 1.0, secondary students are counted at 1.25, *and all* students with special educational needs as determined on "PEP tests" are counted at 1.25 [(unless they happen to be secondary students, in which case the district loses one of the additional weightings) and students defined as "handicapped" are counted at *2.0*]. (*See IFF 362-B for handicapped weightings.*) (*L 1980, ch 53, §§ 13, 14, 19; L 1980, ch 678, § 4; Education Law, § 3602, subds 9, 9-a, 19.)*

c. Although rigorous application to the aid formula would automatically eliminate State aid to any district with full value of more than [$80,000] *$142,610 per pupil and per pupil income wealth of more than $37,125* ([15] *11.57* mills x [80,000] *$142,610* = [$1,200] *$1,650*), each district [was] *is* guaranteed that notwithstanding the formula, it would receive State aid of no less than $360 *per pupil,* irrespective of the district's *real property or income* wealth. This is the so-called "flat grant." (Polley Tr. 14,867-868, 14,875; PX-12 at 5) (Education Law, § 3602, subds 3, 12.)

d. Districts in which the pupil count is decreasing are entitled, in the alternative, to calculate their State aid entitlement on the basis of "total save harmless"—that is, they are entitled to receive the same total State aid they received in the past, with [an] *no* adjustment for inflation. Districts experiencing sharp increases in full value, which under the aid formula automatically reduces State aid entitlements, are entitled alternatively to calculate their aid entitlement on the basis of what they received per pupil in [prior years] *the previous year, provided the increase does not exceed 8 per cent per pupil or the amount they received the previous year. This new option is called "special aid." (L 1980, ch 53, § 18; L 1980, ch 678, §§ 1-2; Education Law, § 3602, subd 18* [This is the so-called "per pupil save harmless." (Wilson Tr. 15,668-669; Polley Tr. 14,904-906; PX-12 at 9-10)]

e. Because of declining school populations and increasing property values, [almost] *about one-third of* all school districts now find it to be in their financial interest to calculate their State aid entitlements on the basis of [one or the other of] the save harmless *or special aid* provisions. At the time of the 1974 revisions to the school finance formula, over 300 school districts were on save harmless under the Diefendorf law. (Wilson Tr. 15,619) (X 5022) At the time of trial, 699 of the State's 705 major school districts were operating under the save harmless provisions of the 1974 law. (Polley Tr. 14,907) (X 4835) With respect to these school districts, aid is received—not pursuant to the workings of the statutory aid formula and its various weightings *during the current year*—but by reference to what the district received *either* as a whole or per pupil in some past year. Some districts have been on save harmless for many years; their entitlements are now calculated on the basis of what they received under whatever formula existed years ago. *In 1974* [E] *e*ighteen districts in the State were still receiving aid based on their 1965 entitlement. [at the time of trial.] (Garms Tr. 746) (III 1016) *In 1980-81, approximately 230 districts exercised the special aid option and 21 the total dollar save harmless option.*

OFF 7f deleted by Trial Judge.

g. It was not contemplated in 1974 that "save harmless" would become so widespread. (Polley Tr. 15,048; X 4895; see, also Giuffreda Tr. 15,338-340) (X 5001-03) The continued use of "save harmless" [is anti] *has an un*equalizing *effect.* (Tr. 15,048-50) (X 4895-97)

h. There are additional categories of aid for buildings, transportation, BOCES, and for various categorical programs. [The formulae for computing BOCES and transportation aid happen to prove more lucrative for property-rich districts than for poor ones (PX-12, pp 15-17; III 1109-11; Garms Tr. 764, 773-74, III 1029-30, 1032-33)] *One of the two alternative computations available in the BOCES formula provides a wealthy, high-spending district with recoupment of almost the same percentage of its approved expenses as a poor district (Tr. 773-774, III 1032-1033; PX 12, pp 16-17, III 1110-1111).*

V. HOW THE SYSTEM OPERATES IN FACT

A. Sources of Funds

8. In New York, school funds come primarily from two sources—from State appropriations under the aid formula and under various categorical programs, and (except in the case of cities) from taxes imposed by independent school districts upon real property located within district boundaries.

9. State aid of all kinds at the time of trial provided only 40 per cent of total expenditures by all the State's school districts. This percentage has declined from a high of 48 per cent in 1968-1969. In 1973-1974, the proportion of funds provided by the State was as low as 38.7 per cent (DX-CQI at 2-3; X 5093-94; DX-B at 1, 7; III 1113, 1120).

10. Federal aid is not a significant factor in the revenues available for schools in New York, not reaching six per cent of expenditures in any year in the past decade, and usually running under five per cent. (DX-CQ1 at 3-4) (X 5094) The amount of Federal aid to New York had declined slightly since 1974. (Polley Tr. 14,916) (X 4839)

B. Uneven Access to Wealth

11. For purposes of these findings, taxable property wealth is stated in terms of the full value behind each pupil, with pupils counted on the basis of [weighted average daily attendance. (This and other terms are defined in Appendix A herein.)] *total wealth pupil units (TWPU) which includes weightings for attendance, secondary school programs, pupils with handicapping conditions and PSEN pupils.* (See also PX-12 at 2; III 1095-96; DX-CQ2 at I-22 and I-23; X 5149m-49n.) (*L 1979, ch 288, § 7.*)

a. It has been standard practice in New York since the 1930's to use this method to define local fiscal capacity for school finance purposes. [(DX-CQ1 at ix and x)] (Burke, Tr. 10,895, 96) (VIII 3952)

b. Fiscal capacity defined in this manner has played a key role in the administration of the State aid formula under all recent legislation, and continues to do so under the current formula. (DX-CQ2 at I-23; X 5149n; DX-CQ1 at 7; X 5098)

12. The State's more than 700 school districts have grossly unequal access to taxable property wealth.

13. This conclusion is supported by the Educational Testing Service study prepared for this case by Dr. Joel Berke from official data supplied by the State. (PX-37) (IV 1521) That study disclosed the following facts:

a. The range in property wealth among school districts for the year 1974-1975 was 46 to 1, or from $8,884 in the poorest district to $412,370 behind each pupil in the richest. (Id. at 9) (IV 1534-35)

b. Disregarding all districts in the richest 10 per cent and the poorest 10 percent does not eliminate the pattern of unequal access to taxable property wealth. The district at the ninetieth percentile has over $86,000 in full value per WADA, whereas the district at the tenth percentile has only $20,840, for a ratio of more than 4 to 1. (Ibid.)

c. Large numbers of districts have property wealth greatly different from the average district wealth of $49,000. Some 58 districts have less than $20,000 per pupil, while another 149 districts have less than $28,000. On the other hand, 152 districts have more than $60,000 per pupil. (Id. at 10) (IV 1535, 36)

d. These disparities are marked even within counties. Nassau County, e.g., has three [large] districts (Manhasset, North Shore and Great Neck) with more than $124,000 per pupil, and three [large] districts (Levittown, Roosevelt and North Merrick) *ranging from* [with approximately] $30,000 *to $37,400.* Suffolk County has three districts with over $370,000 and three others (including Brentwood and Middle Country) with less than $27,000. Westchester County has one district with over $330,000 and others (including Lakeland) with less than $37,000. (Id. at 30-32) (IV 1556-58)

By 1981, the same three highest Nassau County districts ranged from $197,000 to $176,000 in per pupil wealth while the same lowest ranged from $42,000 to $63,000; in Suffolk County the three richest districts had per pupil wealth in excess of $432,000 while the three poorest had less than $38,000 (SED SAO 91-2, 9/16/81).

Even with the 1981 legislative changes, however, Levittown will receive an increase in State operating aid of less than $29,000, or only 0.21% more than it received in 1980-1981. By contrast, Great Neck will receive almost $24,000, or 0.71% over its 1980-1981 operating aid (SED SAO 91-2, 9/16/81).

e. These disparities affect not only large numbers of districts but also large numbers of actual pupils. Only 18 per cent of the state's pupils live in districts within ten per cent of the average wealth per pupil of $49,000. More than half of the pupils, or 54.7 per cent of the 2.3 million pupils outside New York City, live in districts whose wealth is more than 25 per cent above or 25 per cent below the average. That is, more than half the students in the state live in districts with full value of more than $61,870 or less than $37,122. (Id. at *9,* 17-18) (IV 1535, 43-44)

14. That New York's school districts have grossly uneven access to wealth is corroborated by studies prepared by witnesses for the defendants.

a. [Miss] Lois Wilson in January of 1976 prepared a draft analysis for the members of the Governor's Advisory Panel of Consultants. (PX-230) (X 5236) That study, "Inequities in New York State's System of School Finance," using somewhat later data than that used in Dr. Berke's study shows the same 46 to 1 ratio between the state's richest and poorest districts. (PX-230 at 7) (X 5253) It also showed the same pattern of marked wealth differences within counties. It showed that Suffolk County, e.g., had five districts with over $300,000 in full value, and another five with less than $30,000. Brentwood, the poorest district in the county, has only one-seventeenth the wealth of the richest. (Id. at 9) (X 5255) In Nassau County, Levittown had one-fifth the wealth of Manhasset, and one-fourth or less of the wealth of Great Neck and North Shore. (Id. at 10) (X 5256) In Albany County, the ratio between the richest and poorest districts was nine to one. (Ibid.)

b. [Miss] *Lois* Wilson's more recent analysis for the same panel, prepared in [October] *December* of 1976, came to the same conclusion as to uneven access to wealth. (DX-CQ1) (X 5087) The October 1976 study noted that, although wealth levels had been increasing generally throughout the state over the years, disparities between rich and poor districts had either not diminished or had actually widened. On the basis of data for the 1975-1976 school year, the richest district in the state (Fisher's Island) had 52 times the wealth of the poorest district (Salmon River), while the differences between the ninetieth percentile district and the tenth percentile district remained at the 4 to 1 ratio found by Dr. Berke's study for the preceding year. (Id. at 10) (X 5101)

c. [Miss] *Lois* Wilson's 1973 study for the Working Task Force on State Aid for elementary and secondary schools showed the same pattern of unequal access to wealth. (PX-223, Attachment # 1 p. 1) (X 5150) So did her 1975 study, "Over-

view of School Finance Inequities in New York State." (PX-229A, at Section 1) (X 5212)

d. The Report of the "Fleischmann Commission" (the State Commission on the Quantity, Cost and Financing of Elementary and Secondary Education) reached the same conclusion in 1972. (PX-13, pp 2B 4-2B.5)

e. Other reports have reached the same conclusion. (Governor Wilson's Report to the 1975 New York State Legislature in December 1974 (PX-14, p. i) Task Force Report of April 1975 (DX-B., p.8) (III 1121)

C. Disparities in Operating Expenditures

15. Operating expenditures per pupil vary widely among the state's more than 700 school districts.

16. Such disparities in expenditures are shown by the Educational Testing Service study prepared by Dr. Joel Berke, using data provided by the state. (PX-37) (IV 1528)

a. The study found that the range in district spending per pupil was from $936 to $4,215, for a ratio of 4.5 to 1. (Id. at 36) (IV 1562)

b. The study *found* that eliminating all districts at the top and bottom ten per cent of the spectrum did not eliminate the pattern of expenditure disparities. The district at the ninetieth percentile, for example, spent $2,051 per pupil, whereas the district at the tenth percentile spent only half of that, or $1,089. (Id. at 36) (IV 1562)

In 1977-1978, operating expenditures per pupil at the second decile of real estate wealth ($37,982) were $1,571 per pupil while in the ninth decile ($86,756) the per pupil expenditure was $2,203 (Research Findings and Policy Alternatives: A Second Interim Report of the New York State Special Task Force on Equity and Excellence in Education [September, 1980] at p 26a).

c. The disparity of expenditures affects not only large numbers of districts, but also substantial numbers of school

children. The evidence shows that, *excluding New York City, there are approximately 600,000 WADA* [approximately 1,750,000 pupils attended schools] in the 443 districts which spent 25 per cent more or 25 per cent less than the mean operational expenditure of $1,458 (Tr 2257 Id. at 19) (IV 1545) [Inclusion of New York City data, would have added another 1,000,000 children to these outside the middle 50 per cent (Berke Tr. 2255) (IV 1481-82)]

17. That operating expenditures vary widely among districts is also shown by studies prepared by witnesses for the defendants.

a. [Miss] *Lois* Wilson's January 1976 study for the Governor's Panel of Consultants found that for the school year 1975-1976, the range in spending ranged from $7,380 per pupil in the highest spending district to $1,340 in the lowest spending district, for a range of approximately 6 to 1. (PX-230, p. 2) (X 5248) The study noted that in Suffolk County, the ratio in spending per pupil was 4 to 1 between the highest and lowest districts. Five districts spend in excess of $4,450, three of them spending more than $6,300, whereas four districts spent less than $2,300. (Id. at 9) (X 5255) In Nassau County, the range was 2 to 1, from $4,040 to $2,096. Three districts spent in excess of $3,280, while such [large but] poor districts as Roosevelt spent $2,308 and Levittown $2,361. In Albany County, the same 2 to 1 ratio applied, with Menands spending $3,393 while the lowest spending district spent only $1,539. (Id. at 10) (X 5256)

b. [Miss] *Lois* Wilson's [October] *December* 1976, study found that the range of per pupil expenditures for the year 1975-1976 was from a low of $1,450 to above $6,000 for districts maintaining kindergarten through twelfth grade. Twelve per cent of the state's school children were in 156 districts where total spending was less than $1,800, whereas 11 per cent were in 117 districts in which total spending exceeded $2,700. Average spending throughout the state in the 1975-1976 year was $2,301. (DX-CQ1 at 48-50) (X 5110-12)

c. Other studies and reports have come to the same conclusion regarding the unevenness of expenditures per pupil among the state's school districts. See, e.g., "Overview of School Finance Inequalities in New York State." (PX-229A at I-4). (X 5212)

D. The Inexorable Relationship Between Wealth and Spending

18. There is a strong [nexus or] connection between the disparities of wealth distribution and educational expenditures among New York school districts.

19. This connection is supported in the Educational Testing Service study which found that there was a "direct, positive and significant correlation between property value and expenditures. That is, the wealthier the district in property value, the more it spends per pupil; the poorer the district, the less it spends." (PX-37 at 3) (IV 1529)

a. The same study disclosed a strong linear relationship between school district wealth and expenditures per pupil, whether measured by operating expense or by total expense. The chart set out at page 3 of the study shows that as a district's wealth increases, so typically do both its operating expenses and its total expenses. The districts with less than $20,000 in full value per WADA had average operating expenses in 1974-1975 of $1,125 and total expenses of $1,508. At each intermediate level (using the same seven categories traditionally used by the state) wealth, operating expenditures and total expenditures increased together. This pattern continued to be reflected when the study separated the traditional wealth categories into additional classsifications. As wealth increased above $60,000, both operating expenditures and total expenditures continued to increase. (Id. at 21) (IV 1547)

[17] *20.* [Miss] *Lois* Wilson's [October] *December* 1976 study for the Governor's Panel found the same linkage between wealth and spending (DX-CQ1, X 5087). The study showed that, for the 1975-1976 year, "there was a marked difference within various per pupil wealth intervals—from an average of

$1,789 for the 44 districts with less than $15,000 full value per pupil to $3,744 for the 21 wealthiest districts which have from $120,001 to $330,000 full valuation per pupil." (DX-CQ1 at 56) (X 5115a) Her study noted that:

a. No district spending under $1,500 (in total general fund expense per pupil) had more than $35,000 in full value.

b. No district spending under $1,800 had more than $55,000 in full value.

c. No district spending under $2,100 had more than $75,000 in full value.

d. No district spending under $2,400 had more than $105,000 in full value.

e. All of the 66 districts spending more than $3,000 per pupil had at least $35,000 in full value, and 57 of these high spending districts had more than $60,000 in full value. (Ibid.)

21. [Mr.] *Dr.* Charles Cook's study, prepared for the defendants found that differences in local property wealth is the principal factor in determining expenditure differences, explaining over 80 per cent of the spending variations. (DX-BP at 5-8) (IX 4602)

22. The relationship between school expenditures and taxable property wealth is not simply fortuitous or coincidental, because the school finance scheme created by the legislature makes it highly likely that rich districts will spend more per pupil than poor ones.

23. The statutory scheme explicitly links property wealth to school spending, in that it [assumes a spending level norm of $1,200 *per pupil* and] provides state aid to school districts to [raise the funds necessary to achieve that *level of spending*] *assist in raising a spending level of $1,650 per pupil* so long as they impose [the same 15] *an 11.57* mill tax. (*Education Law, § 3602, subd 1, par i; subd 3, par b; subd 12, par b.*)

24. Wide differences in property wealth among the districts means that imposition of the same tax rate will raise vastly

different amounts, and that rich districts will be able to raise substantially more than [$1,200] *$1,650* by the imposition of rates much lower than [15] *11.57* mills, while poor districts imposing sharply higher taxes upon themselves will not be able to match either the levels of spending achieved by the rich districts or even average levels of spending. The state legislative scheme, therefore, makes it easy for rich districts to achieve high levels of spending while making it extremely difficult, if not impossible, for poor districts to do so. (*L 1981, ch 53, §§ 24, 25; L 1980, ch 53, § 15; Education Law, § 3602, subd 12.*)

25. The extent to which imposition of the same tax rate has sharply different fund-raising consequences is shown in the Educational Testing Service study *prepared for this case.* (*see OFF 13 supra*) (PX-37) (IV 1521)

a. Table II-7 demonstrates that the [same] 15 mill tax *necessary to raise $1,200 under the 1974 formula would* [will] generate over $6,000 per pupil in state's wealthiest district, $1,283 in the 90th percentile district, only $314 in the 10th percentile district and only $133 in the poorest district. (Id. at 22) (IV 1548)

b. [Put another way, t] *T*he study *also* shows at Table II-8 that districts with full value of over $60,000 seeking to produce $1,500 locally would need to impose a tax rate of only $18.70, or 7 per cent below the current average tax rate in such districts. Districts with full value of under $20,000, on the other hand, [must] *would be required to* impose a tax rate of $87.34, or 456 per cent of the current average tax rate in such districts. To yield the same $1,500, districts with full value between $20,000 and $28,000 would have to impose a tax rate of $60.95, 231 per cent above their current average tax rate, and districts between $28,000 and $36,000 in full value would have to impose a tax rate of $46.61, or 138 per cent of the current average tax rate in such districts. (Id. at 25) (IV 1551)

c. In fact, districts with full value of under $20,000 raise*d* on the average only $276 per pupil, whereas districts with more

than $60,000 of full value raised an average of $1,743 per pupil. (Ibid.)

d. More refined analysis (Table II-8a) of the wealthier categories shows that the trend continues. Districts whose value [is] *was* $76,000 or above needed to impose a tax of only $15.89, or 18 per cent lower than their current average tax rate, in order to raise $1,500. *On the average,* [S]such districts, in fact, locally raised $1,949. (Id. at 26) (IV 1552)

e. Comparing school districts within the same county underscores this relationship. Nassau's poorest district, Levittown, with a full value of $30,568, raised only $852 locally by imposition of a tax rate of $27.87. Roosevelt's tax rate of $29.47 raised $940 on a full value of $31,908. Great Neck, on the other hand, with a tax rate of only $23.85, raised $2,972 on a full value of $124,605. And Manhasset, with a tax rate of only $18.81, raised over $2,700 on a full value of over $145,000. (Id. at 30) (IV 1556)

f. The situation in Suffolk County was shown to be more extreme. The county's largest and poorest district, Brentwood, was able to raise only $614 locally with a tax rate of $26.03 on its full value of under $24,000. On the other hand three small affluent districts imposing a tax of between $7.55 and $10.42 raised between $2,913 and $4,297 on tax basis in excess of $370,000. (Id. at 31) (IV 1557). Three larger affluent districts—Port Jefferson, Southampton and Easthampton—generated between $1,878 and $2,692 locally with tax rates of only $19.17, $9.28 and $10.21. (Id. at 31-A; IV 1557a, [omitted from PX-37 but set forth in PX-38])

g. The same pattern existed in Westchester County where districts like Pocantico Hills, Hendrick Hudson and Harrison raised heavy local yields with tax rates as low at $11.83, while the second poorest district, Lakeland, taxing itself at $28.30, was able to raise only $1,046 on its tax basis of less than $37,000. (PX-37 at 32) (IV 1558)

VI. MEANINGFUL INEQUITIES RESULT FROM THESE EXPENDITURE DISPARITIES

26. The inability of property poor districts to reach the expenditure levels attained by property-rich districts in the same county or region has consequences that are real and meaningful.

A. Differences in Tax Burden

27. One consequence is that property poor districts must and do tax themselves at much higher rates in order to reach the same or, more usually, lower levels of expenditure.

28. These high rates of taxation in property poor districts have unintended but drastic effects on the residents and educational services provided in such districts.

a. In Roosevelt, the tax burden on residents has led to an alarming number of foreclosures on mortgages and has created an incentive for people to leave the district. (Tr. 3098, 3099-3100) (IV 1855-57)

(1) Foreclosures make the community unstable and make it impossible for the district to project population and enroilment. (Tr. 3099) (IV 1856)

(2) It has also been the district's experience that empty houses will be purchased by speculators who put two or three families in a house where only one had previously resided, producting overcrowding and increasing the burden on educational and other [village] *local* services. (Tr. 3099) (IV 1856)

b. In Levittown, the tax burden on residents has made it increasingly difficult for the school Board to obtain voter approval of school budgets.

(1) The budget presented to the Levittown voters for the 1976-1977 school year was more than $1.2 million less than the first budget proposed by the Superintendent to the School Board in the spring of 1976. (Tr. 20,845) (III

938) Nonetheless, that proposed budget was overwhelmingly defeated. (Tr. 20,853) (III 939)

(2) The district was then forced to adopt a contingency budget. That budget deleted all items defeated by the voters, such as transportation beyond state-mandated limits, all pupil supplies, all equipment except that related to the health and safety of children, all library book purchases and purchase of text books beyond the state-reimbursed amount. (Tr. 20,856-857) (III 939-940)

(3) In response to parent petitions, the Board thereafter submitted a proposal to the voters to restore some items to the district's budget, including extracurricular activities, transportation, and pupil supplies. That supplemental budget was also defeated by a substantial majority. (Tr. 20,867-20,871) (III 941-943)

29. Even though they levy higher taxes, property poor districts are unable to provide their children with meaningful educational opportunities available in property rich districts.

B. Differences in Professional Staff Ratios

30. Property-rich districts use their greater expenditure levels to procure more professional staff.

31. That there is a close relationship between expenditure levels and high numbers of professional staff per 1000 WADA is established by the Educational Testing Service study *prepared for this litigation* (*see OFF 13 supra*). That study shows that "with hardly an exception, the higher the expenditure category, the better the ratio between pupils and professional personnel." (PX-37, at 38) (IV 1564)

a. Table III-2 of the study shows that districts with operating expenditures under $1,000 had an average total professional staff of 54.03 per 1,000 WADA, whereas districts with

operating expenditures of $2,500 and above had an average total professional staff per 1,000 WADA of 76.64. This represents a 40 per cent difference in professional staff ratios between schools at the highest and lowest expenditure levels. (PX-37, at 38) (IV 1564)

b. Even ignoring the extreme ends of the expenditure scale, there are striking differences. Districts spending $1,599 or less had an average professional staff ratio of 59.93 or less while districts spending $2,000 or more had an average professional staff ratio of 67.85 or more, a difference of almost 12 per cent. (PX-37 at *38*-39) (IV 1564-65)

32. These different ratios represent significant numbers of teachers and other valuable professional persons available to property-rich districts and not to the property-poor.

a. In the 1975-76 school year a 10 per cent reduction in Levittown's professional staff meant elimination of 75 members of the instructional and support staff—19 elementary teachers, 43 secondary teachers and 13 special services professionals. (Tr. 331-332) (III 874-876)

b. Professional staff ratios are one of the most important indicators of or proxies for quality in an education program. (Berke Tr. 2345; IV 1502; Sobol Tr. 2422, 2425; IV 1643-44)

33. Comparison of districts within the same county neutralizes regional differences and underscores the close relationship between expenditures and professional staff ratios.

a. In Nassau County, for example, the high spending districts of Great Neck and Roslyn had professional staff per 1,000 WADA, respectively, of 82.4 and 77.7, whereas the low spending districts of Levittown and Roosevelt had professsional staff per 1,000 WADA, respectively, of only 58.3 and 62.4. (PX-28) (II 691-693)

b. In Suffolk County, Shorham-Wading River had an operating expense per WADA of $2,309 and professional staff per 1,000 WADA of 74.46, whereas Sachem had an operating expense per WADA of $1,427 and a professional staff per 1,000 WADA of only 55.99. (PX 28, PX-37 at 57a) (II 713-714; IV 1583a)

c. In Albany County, Menands had an operating expense per WADA of $2,376 and a professional staff per 1,000 WADA of 81.5 (PX-37 at 51) (IV 1577) whereas Guilderland had operating expenditures per WADA of $1,666 and a ratio of professional staff per 1,000 WADA of only 59.8. (PX-28) (II 663)

34. The Educational Testing Service study demonstrates that this pattern of high expenditures producing more numerous professional staff is maintained when the various components of professional staff are examined individually.

a. The study found a 40 per cent greater density of classroom teachers per 1,000 pupils in high-spending districts. Table III-5 illustrates this disparity. Districts at the bottom of the expenditure level scale have an average of *47.04* [44.80] classroom teachers per 1,000 WADA, whereas districts spending at the top of the scale averge 62.91 classroom teachers per 1,000 WADA. (*PX 37 at 43,* IV 1569)

b. When the study distinguished between special education classroom teachers and regular classroom teachers, it continued to find the same relationship between expenditures and staff, although in this case the relationship was not perfectly linear. Dr. Berke expressed the opinion, on the basis of his study for the Fleischmann Commission, that the need for special education classroom teachers is greater in poor districts, but the table shows that such districts are unable to achieve the needed concentration of staff for special education purposes. (Tr. 2280-2282) (IV 1491-93)

C. Differences in Class Size

35. Professional staff per 1,000 WADA is a reasonably good indicator of class size within a school district. That is, the higher the number of professionals, the greater the likelihood that the system will have sufficient classroom teachers to maintain small class sizes. Indeed, class size is essentially a function of the number of teaching staff available per pupil. Testimony in the record demonstrates the close relationship in practice between staff ratios and class sizes. (Watkins Tr. 346, 374; III 885, 901; Berke Tr. 2349; IV 1505: Sobel Tr. 2407-08; IV 1638).

36. Property-poor districts find it extremely expensive to reduce class size, because teaching staff is expensive.

a. Dr. Watkins testified that to reduce class size in Levittown by only two children would cost the district $800,000 in additional staff costs, which would mean roughly $1 more on the school tax rate, already *one of* the highest in the county. (Tr. 374) (III 901)

b. Defendants' witnesses on the cost quality relationship confirmed that reducing class size is one of the most expensive things a school district can do. (Hanushek Tr. 18,360; XI 5752; 4761; Pincus Tr. 18,891)

1. The dispute over class size

37. *While* [T]*t*here is no agreement among scholars and researchers on whether [changing] *reduction of* class size—within conventional ranges—*has an* [a]*e*ffect[s] *on* academic achievement [so as to be] *which is* measurable on standardized tests, *and although* [S]some of defendants' witnesses expressed the opinion that small classes may not be a good educational investment (Pincus Tr. 15,594-595) (X 4725-26) (Zinn Tr. 18,659-668) (X 5826-30), *nevertheless* [T]*t*hat lack of agreement does not preclude the Court from finding that a school finance system which enables property rich districts to have small classes, if deemed desirable, but which prevents property

poor districts from having small classes in any circumstances, thereby deprives the latter and their children of meaningful educational opportunities. The financial capability to reduce class size when deemed educationally desirable has important recognized educational consequences.

2. Only property-rich districts can afford small classes

38. Property-rich districts do in fact use their higher level of expenditure to lower overall class sizes. And unlike poor districts, these favored districts also maintain the flexibility to have specially low class sizes in circumstances where they believe small class sizes are warranted.

a. In 1975-76, Great Neck maintained median class sizes for grades K-3 of 20.79, for grades 4-6 of 22.39, for grades 7-9 of 23.79 and for grades 10-12 of 21.47. (PX-58) (IV 1712). [Mr.] *Mortimer J.* Abramowitz, *Superintendent of Great Neck schools,* testified that even with the scheduled closing of three elementary schools, class size at the elementary level would rise to only a fraction over 23. (Tr. 2607-08) (IV 1678-79).

b. Not only did Great Neck have small classes overall, but, in a variety of special circumstances, it employed its resources to lower class sizes even further. When, for example, the number of students who enrolled for a class exceeded maximums specified by collective bargaining contract terms, rather than turn students away, the district created two or more smaller classes. It took the same course of action when enrollment exceeded district regulations regarding the maximum sizes for either advanced or basic courses. Thus, when registration for advanced placement biology in 1975-76 reached 47, the district created three sections of 15, 14 and 11 students, rather than two sections of 23 and 24, in order to avoid having an advanced placement course of more than 18, which was deemed educationally undesirable (PX-62(c) at 30) (IV 1746). Sequential courses such as languages were offered even if registration fell below the normal Great Neck minimum of 15, because it is deemed educationally necessary to maintain continuity and because proficiency can be gained only over an

adequate number of years. (PX-62(c) at 26, 30-31, 39;Tr. 2617-17(A)) (IV 1742, 1746-47, 1754, 1684). Enrollment is also allowed to fall below 15 in courses for advanced or slow learners where individualized attention to students' needs is desired. Thus, one of the high schools in Great Neck had five sections of 10th grade English for students in need of special reading help, with enrollments of 17 in one section, 15 in three sections and 11 in the fifth. According to the high school, this is "in order to stay within the maximum of 18 which is educationally sound." (PX-62(c) at 29) (IV 1745).

c. Scarsdale also used its considerable resources to maintain small class size overall, and abnormally low class sizes in special circumstances. Scarsdale's elementary grades had an average of 22 children per class. In junior high school, the average was somewhat higher, only 24.8. (PX51) (IV 1652-53, 1621). At the secondary level, Scarsdale maintained classes of no more than 15 for students with learning difficulties. And Scarsdale operated advanced placement courses in all curriculum areas without regard to class size. For example, in 1975-76, the district offered three sections of advanced placement English with 18, 19 and 22 students, while advanced placement physics contained only 10 students. (PX-53; Sobel Tr. 2394-96, 2378) (IV 1656-73, 1631-32, 1621).

d. The Lawrence schools maintained an average elementary school class size of 22.4, 26 in junior high and 22 in the high school. (Cohen Tr. 17,046-48) (XI 5491-92).

e. The Bethlehem schools had an average class size of 23 in elementary school and 24 in [junior] *middle* and senior high schools. (Zinn Tr. 18,614-15) (XI 5814-15).

39. Property-rich districts, on the other hand, cannot afford to maintain either such small class sizes or the flexibility to schedule small class sizes in special circumstances.

a. Levittown, for example, had an average class size of 29. Several years ago, it was forced to adopt a rule setting an absolute minimum class size of 15 for advanced secondary

school classes, and 20 for English and social studies courses. If fewer than the minimum number enrolled, the course was dropped, even if the course was sequential. No advanced placement courses were offered because the class sizes would have been under the minimum. A class was not split until it exceeded the maximum set in the teachers' contract, which was 30 for kindergarten, 33 for first through third grades, and 35 for more senior grades. (Tr. 360-70) (III 892-893).

b. Brentwood scheduled all classes at the maximum size permitted by the teachers' contract, which was 26 for kindergarten, 28 for first and second grades, 30 for the third grade, 32 for grades four through six, and 30 through the more senior grades. [Mr.] *Guy* DiPiertro, *Superintendent of Brentwood schools,* testified that, in order to keep within these contract guidelines, the district "blends" grades K-6; a[n] *new* elementary school child is sent to a school outside of his neighborhood if his attendance in class would cause class size to exceed the maximum. [It does so] *This is done* because [it] *the district* cannot afford to hire the extra teachers necessary to break existing classes into more classes of smaller size. (Tr. 1318-20) (III 1163-65). He also testified that six students who had signed up for a 12th grade science course were persuaded to take another course because the class was filled and the district could not afford either to schedule other sections or to break the existing science section into smaller classes. (Tr. 1338-39) (III 1171-72).

c. [Mrs.] *Prathia* Wynn, *President of the Roosevelt School Board,* pointed out that the Roosevelt school district expected to have no classes smaller than 31 and few smaller than 33 in the 1976-77 school year. These class sizes result*ed* from substantial cuts in professional staff since June of 1975, and were being scheduled despite the expectation they would wipe out the gains which have been made in PEP score performance as the result of smaller classes and individualized instruction in past years. (Tr. 3113-14) (IV 1864-65).

3. The Value of Smaller Classes

40. Several witnesses called by the defendants testified that among the reasons why they maintained relatively low class sizes in their property-rich districts were that their teachers strongly preferred them, parents expected them, and both groups believed smaller classes were educationally desirable. (Zinn Tr. 18,628, 18,681, 18,742; XI 5820, 5835, 5852-53; Cohen Tr. 19,505; XI 5510). The witnesses said that they maintained small class sizes to please these groups, despite their own doubts about the educational need for smaller classes. But even these witnesses concluded that in a wide variety of circumstances small class sizes did in fact have genuine educational value, and it was their own practice to utilize small class sizes in those circumstances, despite the expense.

41. First, although there was testimony that certain special kinds of classes might be very large and subject only to the physical limits of the classroom, long teaching experience indicates that once classes get above 25, a teacher loses track of the problems of individual students and cannot tailor instruction to the needs of those students.

(1) [Mr.] *Mortimer J.* Abramowitz, Superintendent of Great Neck *schools,* testified to his own strong belief, based upon his experience as an educator and an administrator, that 25 is the most desirable size class for a teacher to work with. (Tr. 2,640-41) (IV 1698-99).

OFF 41(2) deleted by Trial Judge

(3) [Mr.] *Gordon* McMillan, [of] *an elementary school principal in* Levittown, explain that, particularly in the early years, children proceed through school at varying developmental ages, some ready to read and some not. At this crucial stage, individualization, *which* is essential, [and it] is simply not possible in his own elementary school where class sizes now average more than 30. (Tr. 207-09) (III 838-840).

(4) Dr. *Thomas* Sobel, *Superintendent* of Scarsdale *schools,* testified that the reason for his district's policy of keeping class

sizes small in the early grades is that individual attention in these crucial early years enables a child to get a good start in school, which carries through in later years. (Tr. 2383-84) (IV 1624-25). He said that his district would schedule three classes of 20 children each rather than two of 30 in the elementary years "because of our own educational judgment." (Tr. 2454-55) (IV 1650-51).

(5) Dr. *Richard* O'Rourke, *Superintendent* of Burnt Hills-Ballston Lake *schools,* gave similar testimony, stating that small classes and individualized instruction in the early years enable a child to develop a healthy self-image, as well as the belief that school is a good place to be and that he can achieve success. (Tr. 1686) (IV 1392).

42. Second, there was a general consensus that remedial classes for disadvantaged children or children with learning disabilities, and special classes for the gifted must be smaller than normal classes. In Scarsdale, classes for pupils with learning difficulties are not permitted to exceed 15 (Sobel Tr. 2,376-78) (IV 1620-21) and in Great Neck, they cannot exceed 18 (Abramowitz Tr. 2,641-42) (IV 1699-1700). Dr. *John* House, *Director of the Division of Federal Opportunity Programs, State Education Department,* testified that remedial classes should be kept from 12 to 15 students, with a maximum of 14 or 15, and that classes for disadvantaged children in the early grades should be kept in the range of 12 to 15. (Tr. 16,948-49, 16,953-54) (IX 4460-61, 4463-64).

43. Third, a number of witnesses testified that the flexibility to have small class sizes is necessary in order to achieve curriculum goals. Because of normal attrition, it is customary for fewer students to enroll for the later years of languages, for advanced science and math courses (e.g., Abramowitz Tr. 2617; IV 1684, 1622; Sobel Tr. 2379; Lyons Tr. 17,611-17, 612; XI 5640-41) and for advanced placement courses offered to talented children who are college-bound (and which save the children both time and money when they get to college). [Mr.] *Mortimer J.* Abramowitz testified that advanced placement

courses were limited to 18 students in Great Neck because of the great amount of teacher preparation and individualized instruction necessarily required by such courses, and that this practice is generally followed in Nassau and Westchester school districts. (Tr. 2641, 2666) (IV 1699, 1711).

44. Fourth, there was also agreement among the witnesses that high school English courses must be kept to relatively small sizes because of the need to reduce an English teacher's work load to the 100 pupils per week established as a benchmark by the National Council of Teachers of English. The rationale for this practice is that the effective teaching of composition requires English teachers to read and comment carefully on student papers. When an English teacher's pupil load exceeds 100 pupils, the number of papers generated are more than the teacher can handle. Accordingly, property-rich districts either restrict the size of English classes, or—equally expensive—reduce the number of classes that an English teacher must [meet] *conduct*. (Sobel Tr. 2446-47; IV 1648-49; Zinn Tr. 18,673-674; XI 5833-34).

45. Fifth, there was a consensus of opinion that in the science area, or in other courses using complex or dangerous equipment or materials, it is necessary sharply to limit class size. Although the Regents require students taking a Regents examination to have 30 laboratory experiences in physics and biology, Levittown students [get] *were getting* those experiences only by watching someone else doing them and very few students will have had that many experiences of real "hands-on" laboratory experimentation. It is absolutely vital that a science student regularly get his hands on actual apparatus and himself perform laboratory work. (Friedland Tr. 121-125; III 808-812; Sobel Tr. 2400; IV 1634-35). Science classes should be small so that dangers attendant upon the performance of experiments can be minimized by close supervision. (Tr. 18,675) (XI 5834).

D. Differences in Curriculum Offerings

46. A school district's capacity to offer variety and richness in its curriculum closely depends upon its capacity to afford a high number of professional staff per 1000 WADA and small class sizes where necessary. (Sobel Tr. 2410-11) (IV 1639-40).

47. Property-poor districts cannot provide the breadth of curriculum available in property-rich districts.

48. This is particularly true with respect to gifted and talented children. In its January 1976 position paper, the Board of Regents noted that only a small percentage of the estimated 200,000 gifted students in the state were receiving special programs designed for them. The Regents recommended the devotion of substantial new resources to provide the gifted and talented "with educational opportunities for their total emotional, intellectual and social development." (PX-9[a] at pp. 4 and 9). *In 1981 the Legislature provided aid for each district which conducts programs for the gifted and talented. They will receive $40 each for 3% of their 1980-81 combined adjusted ADA, a formula which would provide only $12,000 in such assistance for eligible school districts with an ADA of 10,000 (L 1981, ch 53, § 36; Education Law, § 3602, subd 23).*

49. The inability of property-poor districts to provide educational opportunities for the gifted is exemplified by their inability to provide such curriculum alternatives at the secondary level as advanced placement ("AP") and other advanced courses.

(a) AP programs enable the gifted to receive intensified study opportunities in their senior year beyond the usual high school curriculum. (Abramowitz Tr. 2621-22) (IV 1687-88). Students receive instruction and peform at the college level.

(b) AP programs provide other benefits as well. A student who completes such a course and performs well on an examination administered by the Educational Testing Service may enter college with advanced standing, avoiding courses whose content he had already learned and thereby saving money by

completing the college curriculum in a shorter period of time. (Friedland Tr. 140-41; III 818; Sobel Tr. 2392; IV 1630). Furthermore, because AP courses offer more challenging and enriching educational opportunities, they provide an incentive for the academically gifted to remain in school through the senior year rather than to leave after the junior year or in the middle of the senior year when many are not yet socially or financially ready to start college. (Friedland Tr. 141-42; III 818-819; Watkins Tr. 367; III 897; Cohen Tr. 19,506; XI 5510-11). The continued presence of the intellectually gifted child in the school contributes to the school's academic atmosphere. (Watkins Tr. 367) (III 897). And the opportunity to teach these courses is stimulating to faculty members, who sometimes lose intellectual interest in teaching only basic courses year after year. (Friedland Tr. 148-150) (III 821-823).

(c) Levittown once offered AP programs, but has been forced to eliminate them because they require intensive staffing. Teachers of AP programs must devote more time to preparation and individualization than teachers of less demanding courses. Consequently, AP teachers must bear a lighter pupil load, which Levittown was unable to afford. (Watkins Tr. 366) (III 897-898).

(d) In Great Neck, by contrast, in 1975-76 AP courses were offered in English, American and European history, calculus, biology, chemistry, physics, French, Latin and Spanish. (PX-62(c)) (IV 1716-19). Scarsdale offered AP courses throughout the curriculum, even where class sizes were small. In the first semester of the 1975-76 school year, Scarsdale offered AP courses in English, European and American history, physics, biology, chemistry, mathematics, French and Spanish. (PX-52, 53) (IV 1654-73).

50. Similar disparities exist in the ability of districts to offer other advanced courses in academic subjects.

a. In Levittown a student interested in science had the opportunity to take only the basic Regents program of a year each of biology, chemistry and earth science or physics. (Tr.

103-104) (III 798-799). The single advanced science course available in the district was an honors course in biology for twelfth graders. Students who wanted to participate in the course from other high schools in the district had to take a bus to the high school where that course was given. (Tr. 132-133) (III 816-817). An advanced chemistry course formerly given in the district was eliminated when enrollment dropped below 15 students. (Tr. 133-34) (III 817).

b. The curriculum review study in Brentwood noted that the district provided virtually no opportunity for able science students to pursue advanced topics in the sciences beyond the Regents program, apart from a single course on pre-selected topics. (PX-16 at 105) (III 1245). It pointed out the general failure of the high school's social science program to provide instructional patterns and materials suitable for challenging the gifted. (PX-16 at 110-112) (III 1246-48). Indeed, at the time of trial Brentwood was contemplating elimination of the entire twelfth grade social studies program in order to reduce the district's budget and hold the next tax increase to 10 percent (Tr. 1395-96) (III 1187-88).

c. On the other hand, the Half Hollow Hills School District in Suffolk County offered advanced courses in a number of subject areas through its elective program. For example, the high school offered advanced English electives on such subjects as the novel, poetry, advanced composition, Shakespeare and Chaucer. the purpose in providing those courses was to ensure that students who decided to stay in the high school for a full four-year program had "a fine English experience." (Tr. 17,613-15) (XI 5640-42). The district also offered electives in advanced science and mathematics. (XI 5643).

51. Property-poor districts cannot afford to provide their students with either the variety of offerings in languages or the extended number of years of language study provided by districts with more property wealth.

a. A child should commence language study at the earliest possible age; young children are better able to apprehend

patterns of intonation and sound in foreign tongues. As speech habits become set in later years, that learning process becomes more difficult. (Sobel Tr. 2385) (IV 1625-26).

b. Educators agree that a language sequence should be continued as long as possible, because proficiency can only be gained through study over a period of years. (Abramowitz Tr. 2617-2617A) (IV 1684-85).

c. In order to maintain continuity between high school and college, a student should be permitted to continue a language throughout the high school years, particularly if the child intends to pursue the language in college. (Tr. 2386, 2617-17A) (IV 1625-26, 1684-85).

52. Students in property-poor districts have available to them fewer choices of languages for study. They also start the study of languages later in their lives and are unable to continue language study beyond the first several years.

a. At the time of trial foreign language study had been abolished in the seventh and eighth grades in Levittown; the earliest a student could start a language was in the ninth grade and four was the maximum number of years for study. In practice, however, the fourth year had been eliminated; it was difficult to find students necessary to meet the class size minimum of 15 in each of the three secondary schools in the district. (Tr. 359, 369) (III 891-892, 898-899). If Levittown had the resources, its board of education would restore foreign language study to the junior high schools. (Tr 398) (III 908).

b. At the time of trial Brentwood offered language study commencing in the ninth grade but only in Spanish and French. (Tr. 1,337) (III 1170).

(1) In the curriculum review study of the Brentwood schools, the district was criticized by the State for failing to make first year French or German available to students in their junior year. The recommendation that such offerings be made had not been implemented, because the school was on split sessions and French and German were

not offered in the morning session when 11th and 12th graders attended classes. Those courses were offered only in the afternoon session when the 10th grade was in attendance. (PX 16 at p. 77; Tr. 1,369-70) (III 1239; 1182-83).

(2) [Since] *After* the foregoing study, the problem of language offerings [had] worsened. Brentwood no longer offered German in the ninth grade. If a student did not start that language in the tenth grade he would miss it entirely *unless he were willing to stay for the afternoon session.* The same was true of students who failed to start French or Spanish in the tenth grade. (Tr. 1,370) (III 1183).

OFF 52b (3) deleted by Trial Judge.

53. Students in school districts with greater property wealth have a variety of languages to choose from, can start them early in their educational careers and achieve as much as six years or more in language instruction.

a. In Great Neck, the junior high school program offered French, Latin and Spanish for grades seven and eight. Those languages could be continued in all the high school years for up to six years of language study. In addition, the high school curriculum in Great Neck offered Hebrew, German and Russian. Thus, it was possible for a student in Great Neck to choose from among six different languages. (PX-62(c), Tr. 2618) (IV 1736-37, 1685) Although classes in German and Russian had to be discontinued at one of the two high schools in the district, they were still available in the other. (Tr. 2618) (IV 1685).

b. Similar offerings were available in Scarsdale. In the first semester of 1975-76, the district offered high school French, Spanish, Latin, Greek and Russian. (PX-53) (IV 1686-88). French and Spanish were available in the seventh grade, and pupils starting French or Spanish in that year could continue the language for a full six years. (Tr. 2,384-85) (IV 1625-26).

c. Lawrence, a "flat grant" district in Nassau County, also offered French and Spanish to students in the seventh and eighth grades, and at the secondary level, Russian, Italian.

d. Half Hollow Hills School District offered French, Spanish, German and Italian on a regular basis, starting in the seventh grade and continuing through the 12th. Some students exceed that number of years of study by independent study courses. (Tr. 17,615) (XI 5642). In addition, the district has on occasion offered independent studies in such courses as Hebrew, Latin, Japanese, Modern Greek and Portuguese by hiring members of the community with expertise to teach them. (Tr. 17,615, 17,628) (XI 5642, 44).

54. Property-poor districts cannot afford to provide adequate programs or courses in the arts to enrich the basic curriculum in their schools.

a. In Brentwood there was no instrumental music program at the elementary level. Although the district attempted to implement an after-school instrumental program in response to criticisms made by the curriculum review study (PX-16 at 12) (III 1223), it had been eliminated entirely as a result of budget cuts. (Tr. 1,356-357) (III 1178).

b. Neighboring Half Hollow Hills did have an elementary instrumental music program. Each school in the district had its own instrumental music teacher. (Tr. 17,520) (XI 5634). In the opinion of the District Superintendent, the professionals on the staff who provided such instruction contributed important support and quality to the educational program. (Tr. 17,601) (XI 5634).

c. Roosevelt has had to eliminate art and music specialists at the elementary level due to budget cuts. Those specialists had only been restored to the elementary schools a few years earlier. Adequate programs in the performing arts are important in the Roosevelt School District because many children who go on to college from the district are able to do so only on scholarships received in recognition of their abilities in the arts. (Tr. 3106-07) (IV 1860-62).

Field Trips

55. Property-poor districts cannot afford to supplement their instructional program with enriching experiences like field trips, which are affordable to [more] districts with greater property wealth.

a. In 1975-76, Levittown was able to budget only $0.75 per child for field trips. Moreover, because of a freeze on expenditures imposed by the district on March 1, 1976, unspent portions of the field trip budget were forfeited. (McMillan Tr. 237-238) (III 852-853).

(1) Transportation for a single trip to New York City cost $1.25 per child for grades one to three. Children had to provide an additional $.50 to finance the cost of a single trip. (Tr. 238) (III 853). Furthermore, because of the limited capacity of buses used for the trips and the requirement that each bus be filled to capacity, no single class could take a field trip. (Tr. 238) (III 853).

(2) Because teachers did not like to ask children for money, they planned very few field trips. (McMillan Tr. 241, Watkins Tr. 397) (III 855, 908).

(3) Field trips exemplify what the school district can do for a child who resides in a poorer community where families tend not to travel or visit museums and other cultural centers. (Tr. 238-39) (III 853-854). In addition, field trips eliminated discrepancies between what children see in books and the real world. (Tr. 239-41) (III 855).

(4) Field trips are valuable, particularly in the sciences, since they bring to life concepts discussed in the classroom.

b. In Great Neck, however, substantially more money was available for field trips. The Great Neck preliminary budget for 1976-77 provided $30,000 to fund field trip transportation. (PX-61) (IV 1714). The Superintendent of Schools had recom-

mended a cut in that item from the $45,000 budgeted for the same purpose the prior year. (Tr. 2657) (IV 1706).

E. Teacher Characteristics

56. Property rich districts use their wealth to employ teachers whose experience or training suggest that they are of superior quality.

57. The Educational Testing Service study showed in Table III-3 that high spending districts had teachers with a significantly higher median number of years of experience and more Masters degrees than did low spending districts. (PX-37 at 40) (IV 1566).

58. The level of experience and training of a district's teachers is reflected in teachers' salaries.

59. Although beginning salaries for teachers do not vary widely throughout the state, this lack of variation is in large part a reflection of the decline in demand for teachers over recent years.

60. Nonetheless, observable differences between salaries exist within counties.

a. In 1974 to 1975, Nassau County first step salaries reflected the following variations between high and low spending districts:

	Op. Exp./ WADA	BA	MA	MA + 30
Great Neck	3,165	$10,445	$12,012	$13,056
Roslyn	3,098	10,839	12,465	13,394
Levittown	1,894	9,206	10,537	11,399
Roosevelt	1,862	9,495	10,692	11,473

(PX-28 and PX-8) (III 958-959, 962-963)

b. The differences between what high and low spending districts can pay for teachers at more advanced levels of experience are maintained at later steps in the salary scale:

Sixth Step

	BA	MA	MA + 30
Great Neck	13,056	14,727	15,787
Roslyn	13,217	15,451	16,435
Levittown	10,939	12,490	13,418
Roosevelt	11,605	12,871	13,636

(PX-8) (III 958-963, 966-967)

Eleventh Step

	BA	MA	MA + 30
Great Neck	16,101	17,983	19,010
Roslyn	15,589	18,454	19,482
Levittown	13,610	15,191	16,137
Roosevelt	14,332	15,461	16,231

(PX-8) (III 960-961, 964-965, 968-969)

61. Property rich districts are advantaged at the outset in obtaining teachers because they are often more attractive districts in which to teach. (Sobel Tr. 2431) (IV 1645-46).

62. Salary schedules in property rich districts augment the desirability of teaching in those districts and put districts such as Levittown and Roosevelt at an even greater disadvantage in competing for teachers.

63. [Another aspect of teacher training which high spending districts purchase in greater quantity than low spending districts is teacher certification.] Table III-9 of the Educational Testing Service study showed that low spending districts have a much higher percentage of teachers with temporary certification than do wealthy districts. (PX-37 at 48) (IV 1574).

64. [Social science research in the area suggests that wealthier districts are buying something of educational value. Although the exact meaning of the findings are in dispute it is clear that e] *E*xperience and advanced degrees, whether in their

own right or as proxies for other teacher characteristics, affect student achievement in some respects.

a. Defendants' witness, Dr. Eric Hanushek, found in his analysis of information collected by the U.S. Office of Education (the Coleman data) that both blacks' and whites' ability measures increased as average teacher experience increased. (Tr. 18,337) (XI 5747).

b. Defendants' witness, Dr. Lewis Perl, performed a study for this litigation using data obtained from Dr. Cook's LND file. The study found that teacher experience was significantly related to such performance measures as the percentage of students in a district going to college, the percent of students earning Regents scholarships, the combined average score of students on both reading and math PEP tests and the number of students scoring less than the threshold for minimum competency on the PEP tests. (Tr. 21,049; DX-DU) (XII 6038-40, 6094).

c. The study also found that increasing the percentage of teachers in a district with Masters degrees results in positive and significant effects on a number of performance measurements. (Tr. 21,042-044; DX-DU) (XII 6034-36, 6094). The State Education Department's own research confirms the study's finding on this point. (Polley Tr. 15,011-015) (X 4884-87).

OFF 65 deleted by Trial Judge.

66. Dr. Hanushek found that the recentness of a teacher's educational experience had a positive significant impact on student performance. (Tr. 18,377) (XI 5758). The importance of recentness, he agreed, provides a rationale for encouraging or requiring teachers to take additional courses periodically, whether in a degree program, summer program or in-service training. (Tr. 19,857) (XI 5789).

67. Dr. Sobel gave indirect verification of the expert testimony. Although the amount of credits above a BA degree is

not in itself an indicator of the quality of the teacher, he admitted there is something to be said for a teacher who "remains alive and alert and growing and responsive on the changing needs and conditions of her pupils." (Tr. 2,427) (IV 1645).

F. Differences in Pupil Personnel Services

68. Property-rich districts buy more pupil personnel services than property-poor school districts can afford.

69. The Educational Testing Service study found more than a 100 percent difference between the lowest and highest spending districts in the number of professionals providing pupil personnel services per 1000 WADA.

a. Table III-2 illustrated the disparity. While districts spending at the lowest levels had only 3.08 pupil personnel staff per 1000 WADA, districts spending at the highest levels had 5.94 per 1000 WADA. (PX-37 at 39) (IV 1565).

b. The disparity was marked within counties. Table III-15 showed that Great Neck and Roslyn had pupil personnel staff per 1000 WADA of 6.13 and 6.12, respectively, while Table III-23 showed that Levittown had a ratio of pupil personnel staff per 1000 WADA of only 4.11. (PX-37 at 56, 64) (IV 1582, 1590).

c. Table III-23 also showed that all Nassau County districts except Levittown had average pupil personnel staff ratios of 5.23, and that Levittown was 21 percent below the county average. (PX-37 at 64) (IV 1590).

1. Guidance Counsellors

70. That property-rich districts hire more guidance counselling services is illustrated by Table III-6 of The Educational Testing Service study. Low-spending districts had 0.61 guidance counsellors per 1000 WADA while high-spending districts had 1.96—a difference of more than 200 percent. (PX-37 at 44) (IV 1570).

71. The State Education Department recommends a ratio of one guidance counsellor for every 250 children at the secondary school level. (Smith Tr. 1533) (III 1354). Property-poor districts fall short of that ratio.

a. In the Brentwood School District the ratio of counsellors to students in the junior and senior years is 1 to 400, while the ratio at the junior high school level is 1 to 340. (Tr. 1533) (III 1355). Although the district had 28 guidance counsellors at the time of trial, 11 were to be eliminated in the 1976-77 school year. (Tr. 1538) (III 1357). That would mean a total of 17 counsellors to service a total student population of over 20,000.

b. In nearby Half Hollow Hills School District a ratio of one counsellor for every 250 students at the secondary level is maintained. The district had recently supplemented its counselling staff by adding three youth counsellors to free regular guidance counsellors for more intensive vocational counselling. (Tr. 17,532, 17,534) (XI 5619, 21).

c. In Great Neck School District, each of the two high schools had seven guidance counsellors, while each of the junior high schools had four, for a district total of 22. (Abramowitz Tr. 2633) (IV 1694). They served a total district student population of less than 8,000, compared to Brentwood's 17 for 20,000.

d. The disparity is also evident in the funds available to the guidance staff for such purposes as visiting colleges to contact admissions personnel.

(1) In Brentwood School District, the travel budget for guidance in 1976-77 was only $1,800, and that figure included not only college visitation but also the cost of attendance at professional workshops. (Smith Tr. 1552) (III 1361).

(2) In Great Neck School District, the 1975-76 budget provided transportation money for guidance of $3,500. (Abramowitz Tr. 2635) (IV 1695).

2. School psychologists

72. Table III-6 of the Educational Testing Service study showed that property-rich districts hire more psychologists. While the poorest districts averaged only 0.08 psychologists per 1000 WADA, the most property-rich averaged 1.03 psychologists per 1000 WADA, a difference of over 1000 percent. (PX-37 at 44) (IV 1570).

73. The State Education Department recommends a ratio of one psychologist to every 800-1,000 pupils, though lesser provision can be made in a community whose residents have access to private resources for psychological counselling. (Smith Tr. 1616) (III 1376).

a. At the time of trial, Brentwood School District had only 10 psychologists to serve over 20,000 students—a ratio of 1 to 2,000, and the district was going to drop three psychologists in the 1976-77 school year, thereby worsening the ratio. (Tr. 1615) (III 1376).

(1) Because of the poor ratio, it was difficult for the district to comply with state mandates for the diagnosing of children in need of special education. Individual testing is so time consuming that the school had to cut corners to perform the prescribed testing within a reasonable time. (Tr. 1617-18) (III 1377-78).

(2) In a district like Brentwood, few residents could afford private counselling and therefore depended primarily on the schools to provide psychological services for their children. (Tr. 1614) (III 1375).

b. Roosevelt School District provided 2.6 school psychologists for its 4,200 students, a ratio of approximately 1 to 1,600. (Wynn Tr. 3093) (IV 1852). Almost half of the children in the district were from families receiving AFDC or were foster children, while 346 children were enrolled in special educational programs within the district. Because of the special needs and problems of the Roosevelt school population, the number of psychologists available to the district was grossly inadequate. (Tr. 3082, 3093) (IV 1849, 1852).

c. A Levittown elementary school of 775 children had access to a school psychologist only 2½ days a week. At the time of trial, seventeen children were on a waiting list to see the psychologist for preliminary examination, and it was anticipated that some would have to be deferred until the following year, since all support services in Levittown were scheduled to be entirely suspended on June 1, 1976. (Tr. 218-221) (III 843, 845).

d. Half Hollow Hills School District, described by its Superintendent as having predominantly upper middle-class white residents, had .9 school psychologists for its school population of 13,000. (Tr. 17,491, 17,494, 17,521) (XI 5595-96, 5612).

e. Lawrence School District had five psychologists to serve its school population of 6,700 (Tr. 17,041, 17,044) (XI 5489-90), for a ratio of 1 to 1300.

3. Speech and Hearing Therapists

74. By Commissioner's regulation, school districts providing therapy for those with severe speech [or hearing] impairments must provide [individual] service *to individuals or groups not to exceed two* for [each severely handicapped child] 30 minutes each day, five days per week, *or to groups not to exceed five for 60 minutes each day, five days a week.* [(Comm. Reg. § 200.4[d][3] and [4]).] *(8 NYCRR 200.4[e][3]). School districts providing therapy for those with hearing impairment must provide individual service for each child 30 minutes each day, five days per week and must provide deaf children with individual service one hour each day, five days a week. (8 NYCRR 200.4[e][4]).* In addition, the Commissioner's regulations require that teachers who service the severely speech impaired who also service other speech [impared] *impaired* pupils not qualified as severely handicapped shall have a case-load not to exceed 75 children. [(Comm. Reg. § 200.4[d][3][ii]).] *(8 NYCRR 200.4[e][3][i][c]).*]

75. Speech and hearing therapists work with children who have language handicaps or hearing handicaps which may be as simple as an inability to discriminate between [dipthongs]

diphthongs or consonant sounds and may range to severe handicaps. (Smith Tr. 1574) (III 1363).

76. A speech impairment can have an impact on learning in the early years in several ways: it may make a difference in a child's ability to learn to read, which can cripple the child's learning throughout the educational process, and a child with a speech problem such as a stutter may develop personal problems when subjected to the impatience of a parent or the ridicule of [his fellows] *other pupils*. (Smith Tr. 1575-1576) (III 1364-65).

77. Property-poor districts *at the time of trial were* unable to provide the level of service which the state mandated for children with speech and hearing impairments. *In 1980, the formula for computing aid to the handicapped was changed to provide aid in amounts related to a survey's estimate of the statewide average of the cost of services, rather than to the handicap designation. See IFF 362B. (L 1980, ch 53, § 19; Education Law, § 3602, subd 19.)*

a. *At the time of trial*, the Brentwood School District had ten speech therapists of whom one was a department head carrying a caseload of legally deaf children. Each therapist saw between 80 and 110 children a week and [is] *was* responsible for three or four schools in the district plus several parochial schools which the district was required to serve. (Tr. 1576-1578) (III 1365-70).

b. Because of the state mandate that therapists see the severely handicapped five times a week, the district was unable to serve all of those children with speech related problems. As a result, there was at the time of trial a waiting list for speech related cases of no less than 120 and possibly as many as 180 students. (Tr. 1579) (III 1367).

c. In order to comply with state mandates and to concentrate services where they might do the most good, the district had eliminated all speech services to children in the secondary schools and to children in the primary grades. Instead, apart from the severely handicapped, only students in grades four,

five and six received services. The justification for such procedure was that, at the age groups involved, the handicap becomes not only a detriment to the child's learning but interferes with the education of other youngsters or causes concern on the teacher's part. (Tr. 1584) (III 1370).

d. The district was unable to provide needed preventive therapy for young children. (Tr. 1578) (III 1366).

e. The burden on the district had been increased as a result of the decision by some parents whose children had been residents at special schools for the deaf to return their children to the public school system. For every intensively damaged child brought into the public schools there will be increasing numbers of children unable to receive preventive therapy. (Tr. 1579) (III 1367).

f. The department head of the speech and hearing resource program in the district was a clinical otologist whose position was to be eliminated in the upcoming school year. He had the ability to teach the legally deaf language skills even though they had no language at all when they entered school. Such children were thereby enabled to participate in regular classes with other children. (Tr. 1580) (III 1367).

g. An elementary school in the Levittown School District had access to a speech therapist for two and one-half days a week. Speech therapy classes were undesirably large. A number of children were on a waiting list.

OFF 77 h and 77 i deleted by Trial Judge.

j. At the time of trial, Roosevelt School District no longer had any speech therapist. There had been one, and when the school was examined by an accreditation team in 1968, the district had been commended for its speech therapy program. The therapist had to be dropped for lack of money. (Tr. 3,093-3,094) (IV 1853).

78. School districts with greater property wealth are able to provide substantially more resources for speech and hearing therapy.

a. Great Neck had from six to eight speech teachers working with children in both elementary and secondary schools. (Abramowitz Tr. 2628-2629) (IV 1692). Lawrence, with a school population of 6,700, had two speech therapists. (Cohen Tr. 17,041-17,044) (XI 5489-90).

b. Half Hollow Hills had four or five speech therapists in the elementary schools. (Lyons Tr. 17,521) (XI 5612).

G. Differences in Equipment and Supplies

79. Property-poor districts suffer from chronic shortages of supplies and equipment necessary to support an educational system.

a. At the time of trial, Levittown School District had the problem of deteriorating equipment. Much of the equipment in the district was then 28 years old. Since Levittown has never been in a financial position to replace old equipment, much of what it had was either beyond repair or would require more money for repair than the district could afford. (Tr. 385-86) (III 903-904).

b. PX-7 illustrated Levittown's predicament. (III 951). In 1975-76, the district budgeted $90,000 for instructional equipment, only $4,000 more than it had spent on instructional equipment in 1969-70. The district estimated that in that six-year period, inflation had reduced real purchasing power by as much as 35 to 50 percent. (Tr. 387) (III 904-905).

c. Levittown's budget for instructional supplies such as paper, pencils and other items used in the classroom had remained approximately the same over the last five years. (Tr. 391) (III 907). PX-7 showed that in 1971-72, the district budgeted almost $158,000 for 16,100 students (III 952). Although enrollment had declined by 1975-76 to 13,400, the budget for instructional supplies had increased less than $1,000 over a five-year period; the 17 percent decline in enrollment would not compensate for the substantial increase in cost over that five-year period.

d. Because the Levittown School District had been unable to pass its budget for the 1976-77 school year, it was operating on a contingency budget. Under that budget, the district was not allowed to expend monies on student classroom supplies, except for a fairly minimal amount (in Levittown's case $22,000) for such basic materials as pencils. (Tr. 20,872; III 944; *Tr. 20853, 20856; III 939*).

e. The impact which Levittown's lack of funds for equipment and supplies has upon instruction was shown in the examples that follow.

(1) At Summit Lane elementary school, each child was allotted $24 for the 1975-76 school year—$10 for textbooks with the rest divided among supplies, equipment and audio-visual materials. (Tr. 225-226) (III 847-848). That figure was 10 percent less than the previous school year. (Tr. 226-227) (III 847-848).

(2) At Summit Lane, ditto sheets were used as substitutes for work books in the reading program. When the district was unable to purchase new ditto paper, teachers took old dittos and reran them, putting printed material on the unused side of a sheet of paper. (Tr. 235-237) (III 851-852).

(3) Summit Lane had four tape recorders for 775 children, and shared the recorders with the library. Teachers regard the tape recorder as an important part of the educational program. (Tr. 227-228) (III 848).

(4) Summit Lane had only three film strip projectors. Such projectors are useful learning tools, since they are visual and a child may continue to look at an image as long as necessary to learn the material. Due to the unavailability of such projectors, teachers simply stopped planning their lesson programs around them. As a result, they ceased to provide new approaches to teaching and relied on old methods. (Tr. 229-230) (III 849-850).

f. Inadequate equipment adversely affects school programs.

(1) In the only advanced biology course in a Levittown school, with 24 students enrolled, there were only six microscopes for their use, requiring four students to group around each microscope. (Tr. 110) (III 802).

OFF 79 f(2) and (3) deleted by Trial Judge.

(4) In the Roslyn School District students in the advanced class each had access to his own microscope. (Tr. 110) (III 802). In a regular Regents classroom in Roslyn, every two students had a microscope. (Tr. 113) (III 804).

OFF 79 f(5) - (7) deleted by Trial Judge.

(8) There are a number of programs developed with federal funds whose objective has been to modernize the teaching of science in the secondary schools. None of these programs had been implemented in Levittown because they are based on the principle of individualization and require more laboratory components than were available in Levittown. Levittown did not have the money for the initial capital expenditures these projects usually require. (Tr. 129) (III 814-815).

(9) When teachers are required to expend large quantities of time creating or improvising equipment which would normally be purchased in other districts they lose the incentive to implement new programs. (Tr. 130) (III 815).

g. The impact of budget cuts on the area of supplies was felt by the Roosevelt School District. At the time of trial, the supply and equipment budget for Roosevelt schools had been reduced to the point where it was barely possible to replace even such basic instructional equipment as typewriters. Teachers were running out of ditto fluid and paper and children were asked to bring pencils and other supplies from home. (Tr. 3108-3109) (IV 1862-63).

h. The Brentwood School District has been unable to maintain adequate supplies and equipment budgets in the face of inflation. (Tr. 1,437-1,438) (III 1196-97).

(1) Recommendations made in the curriculum review study for the Brentwood School District which required expenditures for the purchase of supplies or audio visual equipment have not been implemented. For example, the film service in Brentwood was criticized by the study as inadequate for the district's size. Although that criticism had been partially met by an improved collection of films, full implementation was not possible because of lack of funds and the assignment of priority to [determination] other areas of the school's program. (Tr. 1,364-1,365) (III 1181-82).

(2) Equipment available to students in Half Hollow Hills School District includes a library media center containing carrels with electrical outlets and equipment which a child can manipulate to teach himself. (Tr. 1,006) (III 1154-55). Such equipment has never been used in Brentwood, although one teacher attempted to adapt a single set of such materials in the library. The experiment lasted only a year. (Tr. 1,007, 1,008) (III 1155-56). Audio visual equipment that was available in classrooms of the Half Hollow *Hills* School District was not available to students in the Brentwood School District. (Tr. 1,487-1,488) (III 1205).

(i) The Burnt Hills-Ballston Lake proposed budget for 1976-77 also showed the extent to which equipment and supplies budgets are vulnerable to cost-cutting. The largest budget cut projected by the district apart from personnel cuts was in the area of program support, including equipment, supplies and materials. (PX-24 at 5) (IV 1423).

VII. Local Control

80. Budgetary constraints resulting from the operation of the school financing scheme render local control over education illusory in property-poor school districts. (Tr. 18,969, 18,970).

81. The fiscal constraints imposed upon property-poor school districts as a result of the school finance scheme deprive

them of the effective freedom to choose educational techniques and to allocate resources. As a result, they have little leeway in developing a curriculum beyond that required as a State minimum. (Tr. 18,969, 18,970).

a. In Levittown, budgetary constraints made it necessary to reduce the number of basic curriculum courses. (III 896). Advanced courses in mathematics and languages and courses in certain mechanical arts were eliminated. (III 902).

b. Budget cuts prevented Levittown from expanding its educational offering as it desired. (III 910). As a result, the district could not introduce an elementary industrial arts program (III 908) or an elementary school conversational foreign language program; re-establish a junior high school foreign language program (III 908-909); establish a corrective physical education program (III 909); expand girls' sports in accordance with Title IX of the Civil Rights Act, as amended in 1972; or expand upon learning alternatives such as the open classroom. (III 910).

c. In Roosevelt, shortages of funds resulted in elimination of the elementary art, physical education, guidance and special therapy programs (IV 1861, 1853). All extracurricular programs requiring stipends, such as interscholastic sports and honor society, were eliminated (IV 1860).

d. The "lack of (high school) course offerings" in Brentwood was due to the inability to hire requisite staff (III 1167). Courses in typing, business law, business practices and business mathematics were eliminated at the junior high school level (III 1169-1170).

e. Budget cuts forced Brentwood to eliminate its elementary summer school program (III 1189), the BOCES performing arts program and the BOCES outdoor education program (III 1190) and have resulted in a reduction of the music education staff from 14 to 7 (III 1380). A State recommendation that library math collections be improved for a program of independent study could not be fully implemented (III 1177).

82. Fiscal constraints inordinately deprive poorer school districts of the ability to exercise their freedom to engage necessary teaching and administrative personnel.

a. In Brentwood, nine of the 12 elementary schools did not have assistant principals (III 1158). The hiring of a necessary assistant to the Director of Special Education could not be afforded (III 1175). Education Department recommendations for reducing the average class size of language arts classes could not be followed due to fiscal constraints.

b. Budget cuts necessitated reduction of the number of Brentwood's secondary school guidance counsellors (III 1357-58). Travel funds for college counsellors were cut, limiting the number of colleges that a counsellor could visit to make necessary contacts (III 1360-61). Similar lack of funds prevented counsellors from attending professional conferences and workshops (III 1361).

c. Kindergarten children with identifiable speech handicaps were not treated until the first grade because of staff shortages (III 1365). Brentwood had difficulty in meeting State recommendations and required minimums for professional treatment of children with speech and hearing handicaps and in complying with the State requirement that a school district identify children with reading or mathematics skills greater than two years below grade level (III 1377-78).

d. The Levittown school board resolved that teachers and staff be furloughed for an entire week, without pay, to save money (III 881).

e. There were no funds for substitute teachers in Roosevelt (IV 1854). The district could not afford to hire reading specialists or specialists for staff development programs and program content (IV 1851-52) and was forced to terminate 23 professional staff members in 1975-1976 to eliminate a budget deficit (IV 1860).

f. Low staff in the Burnt Hills district prevented schools from providing services they were interested in providing, such

as for children with learning disabilities and handicaps (Tr. 1694). Budget cuts in the 1976-1977 school year resulted in a reduction in staff by 25.9 positions, 14.9 of which were held by professionals (IV 1396).

83. Testimony at the trial confirmed no inconsistency between achieving greater financial and tax equalization and preserving local control (Tr. 10,954-956, 13,023-13,024, 15,345, 18,968, 18,969).

VIII. Effect of Intervening Legislation

84. The changes worked by the legislation adopted since 1974, including those enacted by the 1981 Legislature, had no substantial effect in alleviating the conditions flowing from the educational finance structure.

FINDINGS OF FACT
PLAINTIFFS INTERVENORS

I. (1) A MAJOR PURPOSE OF NEW YORK STATE'S AID FOR PUBLIC EDUCATION SINCE THE NINETEENTH CENTURY HAS BEEN TO EQUALIZE THE ABILITY OF THE STATE'S PUBLIC SCHOOL DISTRICTS TO FINANCE EDUCATION; AS GOVERNOR ALFRED E. SMITH STATED CONCERNING THE 1925 FORERUNNER OF THE CURRENT STATUTE, ITS "EQUALIZATION QUOTAS" WERE INTENDED TO PROVIDE AN "APPORTIONMENT [WHICH] WILL VARY ACCORDING TO THE ABILITY OF THE COMMUNITY TO SUPPORT ITS EDUCATIONAL PROGRAM" (EX. 176, p. 37) (VIII 4013).

(2) Under [the current statute,] Chapter 241 of the Laws of 1974, *a* school district's ability to support its educational program [is] *was* determined primarily by measuring the value of real property behind each resident student in average daily attendance; the higher the locality's aggregate taxable property per pupil unit, the smaller the State aid. *Under the current statute, a school district's ability to support its educational progam is determined primarily by measuring the value of real property and secondarily by measuring the value of adjusted gross income behind the total wealth pupil units; these pupil units are based on weightings applied to average daily attendance. The higher the locality's aggregate taxable property and income per pupil unit, the smaller the State aid.*

(2-A) *New aids apart from operating aid include:*

(a) *Aid for children with handicapping conditions (see IFF 216, 219, 221-A, 362-A and 362-B below). Prior to 1979-1980, aid for such children was part of operating aid, BOCES aid, learning disabled aid and special services aid; since 1979-1980 it has been provided under a separate excess cost formula. In 1980-1981 the intervenors received a total of $112.8 million from the State total of $242.0 million in all aids for handicapped children (SED 1980-1981 SA 124 Rept., ED No. 239, 3/4/81). In 1981-1982 the intervenors will receive an estimated*

$138.2 million from the State total of $290.9 million in all aids for handicapped children (SED 1981-82 State Aid Projections, SA091-2, DB Ed 3151, 9/16/81).

(b) *Special reading and academic programs aid, providing a total of $13.5 million to the four intervenors in 1980-1981 (L 1980, ch 53, §§ 33-37) and a total of $17.75 million to the four intervenors in 1981-82 (L 1981, ch 53, §§ 38-42).*

(c) *Low-income supplemental school aid (L 1980 ch 53, § 20), under which intervenors were receiving a total of $8.2 million, from the State total of $27.7 million in 1980-1981 (SED 1980-81 SA 124 Rept., ED No. 239, 3/4/81) and will receive an estimated total of $7.5 million, from the State total of $25.0 million in 1981-1982 (L 1981, ch 53, § 33; Education Law, § 3602, subd 20; SED 1981-82 State Aid Projections, SA 091-2, DB Ed 3151, 9/16/81).*

(d) *Diagnostic screening aid (L 1980, ch 53, §§ 21-22), under which intervenors received a total of $1.9 million in 1980-1981, from the State total of $5.1 million (SED 1980-81 SA 124 Rept., ED No. 239, 3/4/81) and will receive an estimated total of $3.4 million in 1981-1982 from the State total of $9.7 million (L 1981, ch 53, § 34; Education Law, § 3620, subd 21; SED 1981-82 State Aid Projections, SA091-2, DB Ed 3151, 9/16/81).*

(e) *Gifted and talented program aid, under which intervenors will receive an estimated total of $1.0 million in 1981-1982, from the State total of $3.0 million (L 1981, ch 53, § 36; Education Law, § 3602, subd 23; SED 1981-82 State Aid Projections, SA091-2, DB Ed 3151, 9/16/81).*

(f) *Limited English proficiency aid, under which intervenors will receive an estimated total of $3.6 million in 1981-1982, from the State total of $4.1 million (L 1981, ch 53, § 35; Education Law, § 3602, subd 22; SED 1981-82 State Aid Projections, SA091-2, DB Ed 3151, 9/16/81).*

(g) *Electronic data processing aid first provided to the intervenors under legislation enacted in 1981 (L 1981, ch 53,*

§ 30; Education Law, § 3602, subd 17, par c) as part of Special Services aid (see IFF 235 and 241 below), under which intervenors receive a total of $4.08 million, from the State total of $4.16 million (SED SAO 91-2, DB Ed 3151, 9/16/81).

II. (3) IN MEASURING LOCAL FUNDING ABILITY, NEW YORK'S AID FORMULA OVERSTATES THE CITIES' CAPACITY TO FINANCE THEIR SCHOOLS IN THAT IT DISREGARDS THE "MUNICIPAL OVERBURDEN" DRAIN OF NON-EDUCATIONAL SERVICES ON THE LOCAL TAX DOLLAR

A. (4) Spending for Non-School Services Is Higher in the Four Cities than Elsewhere in the State.

(5) New York City, Rochester, Buffalo and Syracuse have far higher tax rates for non-school functions than the rest of the State.

(6) The four city districts' taxes for non-school purposes in 1972-73 were $48.09 for $1,000 full valuation while the rest of New York State's were $27.99 (Ex. 66) (IV 1780).

(7) Because of the pressure of the non-school functions and costs, the four cities spent 28.3 percent of their local tax revenue for school purposes in 1972-73, while jurisdictions in the rest of the State were able to spend 45.1 percent of their local taxes for schools (Ex. 66) (*Id.*).

(8) New York City apportioned 28.1 percent of local revenues for schools in 1972-73, and in 1975-76 it spent 20.8 percent of the total city budget on elementary and secondary education (Ex. 66, Tr. 11550).

(9) The overall tax burdens (for school and non-school purposes) are higher in the cities (Ex. 66, Tr. 2736, 16189-90, 15063-64). (IX 4212; IV 1761-62; XI 5385a-86; X 4901-03).

(10) Measured in per capita expenditure terms, the four cities spend *substantially* [many times] more than their surrounding counties or the rest of the State for non-school services.

(11) The cities spend more proportionately for non-school services, both from local revenue and from total revenue including federal and State aid (Ex. 75, 75-80, 122-24, 177). (IV 1789, 1793-95; V 2118-20; IV 1815a).

(12) In 1974 from all revenue sources New York City spent $875.01 per capita for all non-education functions, more than twice that of the rest of the State and far more than its suburban counties (Ex. 177). (IV 1815a).

(13) In 1973 non-school per capita expenditures in Rochester, Buffalo and Syracuse were more than twice those in the balance of their respective counties (Ex. 122-24). (V 2118-20).

(14) With federal and State aid netted out, New York City's non-school spending per capita was $401.06 in 1974 while the figure in the State minus New York City was $183.17 (Ex. 75). (IV 1789).

(15) In 1973 from local revenues New York City spent $95.34 per capita for public safety and Buffalo, Rochester and Syracuse expended $71.75; whereas the villages, counties and towns in the State spent only $22.91, $16.48 and $3.23 respectively (Ex. 81). (IV 1796).

(16) In order to finance its non-school expenditures, New York City must make [more than] *almost* twice the tax effort of its suburbs and the rest of the State (Ex. 75). (IV 1789).

(17) The higher non-school burdens in the four New York cities are representative of those in central cities in all of the Nation's 37 largest standard metropolitan statistical areas (SMSA) (Ex. 87 A, 87B and 87 C). (IV 1803-5).

B. (18) The Cities' Higher Non-School Expenditures Are Inexorable and Reduce the Cities' Ability to Finance Their Education Program.

New York City

(19) The demographic and physical characteristics of New York City dictate its need for higher municipal expenditures

and largely explain why the City cannot devote more of its total budget to education.

(20) The proportion of population below the poverty line is more than 200 percent greater in New York City than in neighboring counties (Ex. 69, Tr. 2885). (IV 1783).

(21) Seventeen percent of the population in New York City are members of families headed by single females; 64% of these families include children under 18 and are below the poverty line (Tr. 2885). (IV 1818).

(22) In 1975, New York City had almost five times as many welfare recipients per 1,000 population as did neighboring Nassau County (Ex. 68). (IV 1782).

(23) Educational attainment of the population is lower in New York City; eight percent of persons over 25 have had four or more years of college, in contrast to 22 percent in the suburbs (Tr. 2886) (IV 1819).

(24) The less educated population depends for employments upon manufacturing, which has been leaving the City (Tr. 9801, 2931, Ex. 166M). (VIII 3648; IV 1829).

(25) A consequence of greater poverty and lesser education among City residents is increased unemployment—in New York City as high as 40 percent among inner city teenagers (Tr. 2905, 4989). (IV 1825; V2275).

(26) Between 1960 and 1970, the age distribution in New York City shifted, with an increase of persons aged 15-24 and 65 and over, and a decrease of persons aged 25-64. (Tr. 9817-19, Ex. 166P). (VIII 3651-53, 3686).

(27) The extreme density of New York City—Manhattan's rate is 30 times greater than Nassau County's—demands higher expenditures for a variety of services including police, fire, mass transit and sanitation (Tr. 3989-90; 2906-07). (V 2056-8; IV 1825-6).

(28) Larger cities have higher expenditures per capita for common non-school services than smaller cities across the United States (Tr. 2883-84). (IV 1817-8).

(29) New York City's housing stock is much older than that of its neighboring counties; 62 percent of the housing units were built before 1940, while only 27 percent of Nassau and 19 percent of Suffolk County housing is that old (Ex. 74). (IV 1788).

(30) The presence of older housing combined with a dependent and poor population increases public service needs; for example, more housing abandonment occurs—21,000 units have been abandoned in New York City each year since 1969—inviting crime, fires and drug abuse. (Tr. 2889, 2897, 5266-69). (IV 1819, 21-22; VI 2402-04).

(31) New York City's streets, highways, sidewalks, sewers and water supply systems are old and heavily used. (Tr. 2890). (IV 1820).

(32) The confluence in New York City of greater burdens—poverty, an older and more dependent population, lower educational levels, higher unemployment rates, greater population and building density, older and more deteriorating building structures many of which have been abandoned, old and heavily used street, sewer and water supply systems—require the City to spend more than other jurisdictions for welfare, Medicaid, police, fire, health, transit and other non-school services (Tr. 2896, 2901-03, 2905, 2899, 2908). (IV 1821, 1822, 1824, 1825, 1827).

(33) New York City [has] suffered a severe economic decline in recent years which [has] exacerbated the conditions underlying its higher public service expenditures; [since] *between 1969 and 1975* the City [has] lost over 600,000 jobs or 15 percent of its job base (Tr. 9796, 2927-29, 4985, Ex. 166 L.M.) (VIII 3645, IV 1827-29; V 2274, VIII 3682-83).

(34) The City has lost population in recent years, those leaving are generally higher income residents while those remaining are the lower income dependent persons who cannot afford to move (Tr. 2933). (IV 1830).

Buffalo, Rochester and Syracuse

(35) The population and physical characteristics of Buffalo, Rochester and Syracuse similarly require these cities to spend a higher proportion of their revenues and more per capita for non-school services, thus reducing the cities' capacity to finance their educational programs.

(36) Each of these cities has proportionately 2 or 3 times the poverty families of its suburbs (Ex. 69). (IV 1783). [(34)] Within the cities reside most of the families in their counties that receive Aid for Dependent Children and other forms of public assistance, as well as most of the single parent households (Tr. 3655, 5060, 3486, 3656, 3493). (V 1973, 2293, 2289, 1974; IV 1942, 1945).

(37) Two of the three cities have greater proportions of old people than do their suburbs (Ex. 129, Tr. 3675-76). (V 2150, 1982-82a).

(38) In Syracuse about 13 percent of the populaton is 65 and over—nearly twice the percentage in the balance of Onondaga County—and 75 percent of its elderly live below the poverty level (Ex. 129, Tr. 5075). (V 2150, 2301).

(39) Each of the cities has substantially higher unemployment rates than its suburbs, as high as 40% among inner city minorities' teenagers (Tr. 3670-72, 4204-05, 5062, Ex. 70). (V 1979-81, 2128-29, 2295; IV 1784).

(40) Buffalo had almost three times as many unemployed in 1970 as the remainder of Erie County, and since then the percentage of Buffalo households headed by unemployed persons has increased substantially (Ex. 70, Tr. 3490, 3499). (IV 1784, 1944, 1947).

(41) Contributing to the upstate cities' high rates of unemployment are the lower education levels of their residents. Among those 25 years and older, 1.9% of Buffalo residents have completed no schooling whatever as compared to .1% in the remainder of Erie County (exclusive of the city of Lackawanna) and 17.3% of Buffalo's residents as compared to

7.5% in said remainder of Erie County did not complete grammer school. (Ex. 105, Tr. 3488-89). (IV 1943, 1958).

IFF 42 deleted by Trial Judge

(43) The cities are far more densely populated than their suburbs; Syracuse has 22 times as many persons per square mile as the balance of the County; Buffalo's density is 18 times and Rochester's is 12.5 times that of their suburbs (Ex. 129, 116, Tr. 3495-96). (V 2150, 2012a; IV 1946).

(44) Housing stock in the upstate cities is much older than in the suburbs (Ex. 74). (IV 1788).

(45) In Rochester 79.5 percent of the housing units were built before 1940 (compared to 25.6 percent elsewhere in the county), and many structures are over a century old (Ex. 74, Tr. 3636). (IV 1788; V 1965).

(46) Much of the cities' housing stock is deteriorating; there are 475 abandoned structures in Rochester, and in the preceding year the city had to demolish 216 structures for health and safety reasons; by contrast, three suburban towns had no abandoned buildings or demolition costs (Tr. 3648-49, 3834-37, 4210). (V 1969-70, 2023-5, 2130-1)

(47) The old "infra-structures" of the cities are deteriorating; Rochester's 70 year old water and sewer systems, streets, sidewalks and curbing require frequent repair and costly replacement. (Tr. 3814-17, 3643-47, 3662, 3827-28). (V 2016-18, 1966-69, 1976, 2019-20).

(48) As the business and government centers of their counties, the three cities must accommodate many more commuters than their suburbs (Tr. 4192-93, 4245-48, Ex. 129). (V 2121-22, 2140-43, 2150). Among cities its size Rochester has the highest daytime relative to nighttime population in the nation (Tr. 3688). (V. 1986).

(49) The confluence of all of these greater burdens in Buffalo, Rochester and Syracuse—greater poverty, an older and more dependent population, lower educational levels, higher

unemployment rates, greater population and building density, more old, decaying and abandoned buildings, deteriorating "infra-structures," and greater numbers of commuters—require the upstate cities to spend more for police, fire, sanitation and other non-school services. (e.g. 4206, 3616, 3648-49, 3831, 3493, 4209, 3810-13, 3514, 3828-30, 3624-25) (V 2129, IV 1954, V 1969, 2022, 1945, 2130, 2013-5; IV 1949, V 2020-22, IV 1954-56).

(50) The municipal overburdens have been aggravated by the severe economic decline suffered by each of the three cities in recent years; for example, between 1970 and 1975, Rochester lost 16,000 manufacturing jobs, more than 15 percent of its manufacturing employment (Tr. 3699). (V 1988).

(51) Much of the cities' economic base has moved from the cities; between 1954 and 1972, retail sales grew 993 percent in the rest of the county while rising only 36 percent in Rochester—less than the rate of inflation (Ex. 84, Tr. 3690). (IV 1800; V 1987); disparities in retail sales between Buffalo and Syracuse and their suburbs were similar (Ex. 84). (IV 1800).

(52) The movement of the base has been further shown by comparative changes in real estate valuations; for example, between 1964 and 1973, property valuation in Onondaga County (excluding Syracuse) increased almost 75 percent, over four times the Syracuse rise in taxable property valuation (Ex. 127). (V 2149).

(53) The movement of the economic base away from the cities has been paralleled by a movement of the middle and upper income taxpayers; the cities have retained the very young and very old; many who could move did so, leaving a poorer and more dependent population requiring increased city services (Ex. 104a, Tr. 3482, Ex. 116, Tr. 3704-06, 4211-12, Ex. 108, Tr. 3506-08). (IV 1957, 1941; V 2012A, 1991-2, 2131-2; IV 1959, 1948).

Police

(54) The four cities spend two to six times per capita more than their suburbs for police protection (Ex. 75, 78-80, 122-24, 177). (IV 1789, 1793-5; V 2118-20; IV 1815A).

(55) The pattern is the same nationwide; the larger the city the higher the per capita expenditure for police services and the more police employees per thousand inhabitants (Ex. 119, 120, Tr. 3979, 3849-50). (V 2071, 73, 55, 58).

(56) The greater per capita spending for police services in the four cities is inexorable.

(57) It is largely the product of much higher crime rates in the cities; for example, in 1974, almost twice as many crimes occurred proportionately in New York City as in the rest of its SMSA; 14 times as many violent crimes per 100,000 inhabitants occurred in New York City as in Nassau and Suffolk Counties (Ex. 67b). (IV 1781).

(58) Juvenile crime is also far greater proportionately in the cities (Tr. 3987, 3659). (V 2056, 1975); one contributing factor is the close correlation between juvenile delinquency and the higher proportions of city children living with only one parent (Tr. 3661-62). (V 2060) (Tr. 3994) (V 1975-6).

(59) Population density, poverty and unemployment are among the principal causes of the higher city crime rates (Tr. 3989). (V 2056).

(60) Some city census tracts with high poverty and unemployment have crime rates 50 to 100 times those of the suburbs or of city fringes (Tr. 3991-92; 3729). (V 2058-59, 1995).

(61) The cities' older buildings in deteriorating neighborhoods produce a greater need for police services because of housing and sanitary code violations (Tr. 3993, 4068-69). (V 2059-2068A).

(62) The higher police expenditures in New York City are compelled by a variety of unique burdens including: 2 million

commuters a day; enormous numbers of tourists; diplomats in need of protection; emergencies in high buildings with elevators; overcrowded subways; numerous bombs and bomb threats; parades, conventions and athletic events; problems arising from immigrants and migrants; runaways; drug addicts; investigations of organized crime and fraudulent transactions in the City's financial district (Tr. 4000-06, 4983). (V 2062-64; 2274).

(63) The police expenditures of Rochester and Syracuse are higher partially because the criminal division of the sheriff's departments of Monroe and Onondaga Counties—financed in substantial part by city taxpayers—serve all areas of the county except the cities (Tr. 4197-98, 3878-79). (V 2124-5, 2034-5).

Fire

(64) Per capita the four cities spend many times more for fire protection than neighboring jurisdictions (Ex. 75, 78-80, 122-24, 177). (IV 1789, 1793-95; V 2118-20; IV 1815a).

(65) Rochester spends almost 9 times as much per capita from local revenues for fire protection as the balance of Monroe County (Ex. 79). (IV 1794).

(66) The greater per capita spending for fire services in the four cities is inexorable.

(67) The vastly greater drain on public resources for the cities' fire services is due mainly to the density of buildings and population.

(68) New York City's concentrated high rise apartment and office buildings—with differing fire-spread characteristics and often constructed with non-fireproof materials—present dangers of massive loss of property and life and necessitate the highest quality fire equipment, the best trained firefighters and rapid response time (Tr. 4754, 3793, 3650-51, 4761, 4759). (V 2253, 2011, 1970-1, 2255, 2254-54a).

(69) The concentration of people and their accompanying social and economic problems, especially in the poorer areas of

the cities, necessitate more costly fire services; most fire calls and false alarms come from the poorer areas of the cities (Tr. 4763, 4765). (V 2255-6).

(70) In recent years the cities have suffered enormous increases in false alarms, serious structural fires and first aid requests (Ex. 141, 142, 110, 109, Tr. 3856-57). (V 2258, 59; IV 1960-61; V2029-30).

(71) An inexpensive volunteer fire service, which is adequate for most New York State communities, could not provide the fire protection which the cities require (Tr. 4753). (V 2253).

Public Assistance

(72) Public assistance constitutes a heavy drain upon New York City's resources.

(73) 12.5 percent of New York City's population receives welfare, in contrast to only 3.6 percent in the rest of the State; 70 percent of the State's entire welfare population resides in New York City where only 43 percent of the State's population lives (Ex. 145, Tr. 4796-4801, Ex. 151 Table 17). (V 2273; 2262-66; VI 2739).

(74) The impact of this heavy concentration of welfare eligibles is particularly pronounced because New York State has chosen to delegate to localities a great[er] portion of the welfare financing burden. (Tr. 4802-03). (V 2266-7).

(75) The greater per capita spending for public assistance in New York City is inexorable.

(76) The public assistance system is governed by the laws and regulations of the New York State Department of Social Services and the United States Department of Health, Education and Welfare (Tr. 4785). (V 2260).

(77) The City has no control over the number of persons eligible for welfare (Tr. 4797-4801). (V 2263-65).

(78) Nor has it any control over the kind and level of welfare benefits payable to eligible claimants from the City's treasury (Tr. 4801, 16101-02). (V 2265; XI 5357-58).

Health

(79) Approximately 1.3 billion dollars of New York City's local revenue budget was devoted to health expenditures in fiscal 1975 (Tr. 4100). (V 2078).

(80) About 94 million dollars of these expenditures were for Medicaid; New York City spends $51 per capita from local revenues on Medicaid while the remainder of the State spends $15 (Tr. 4095-98). (V 2076-78).

(81) 9.4 percent of New York City's population is eligible for Medicaid benefits; only 3.3 percent of the population elsewhere in the State is eligible; 67 percent of the State's Medicaid claimants live in the City (Tr. 4797, Ex. 145). (V 2263-2273).

(82) 190 million dollars are allocated to the Health and Hospitals Corporation which operates the City's public hospitals (Tr. 4090-91, 4095). (V 2074, 75).

(83) The greater per capita spending for health services in New York City is inexorable.

(84) The City has little control over the number of persons eligible for Medicaid benefits; similarly the State's Social Services and Health Departments determine the kind and levels of benefits for Medicaid eligibles (Tr. 4792). (V 2262).

(85) The hospitals operated by the Health and Hospitals Corporation serve primarily the poor and near-poor including *a substantial number of* [more than 800,000] New York City residents who [also] cannot afford Blue Cross-Blue Shield or private physicians (Tr. 4105-06) (V 2078-79). (Tr. 4900) (V 2097, 2099) (Tr. 5915-16).

(86) A further cause of New York City's higher health expenditures is the more serious health problems of its population; the City's death rate is greater than that of the rest of the State, especially for deaths from serious diseases requiring substantial terminal health care (Tr. 4110, 4113-14). (V 2081-82).

Corrections

(87) New York City's State-mandated corrections system costs approximately four times *more* per capita from local revenues *than* [what] localities in the rest of the State pay *from local revenues* (Ex. 76). (IV 1791).

(88) The State reimburses the City for only a tiny fraction of its costs (Tr. 4498-99). (V 2206-07).

(89) The greater per capita spending for corrections services in New York City is inexorable.

(90) The City must provide facilities for prisoners awaiting judicial proceedings and serving sentences (Tr. 4490). (V 2204).

(91) In the past year the City had to move *large numbers of* persons to and from the Courts; the high turnover of inmates produces major costs for prisoner transportation, medical examinations of over 50,000 persons and recordkeeping (Tr. 4493-94). (V 2205).

IFF 92 deleted by Trial Judge

[Courts]

[(93) New York City spends $14.72 per capita from local revenues for its State-mandated Court system while the rest of the State pays only $8.07 per capita (Ex. 77).]

[(94) The greater per capita spending for Courts in New York City is inexorable because of the greater work load in the City Courts (Ex. 156).]

Mass Transit

(95) In 1976-77 [P] *per* capita New York City [spends] *spent* $33.39 for transit operating expenses while jurisdictions in the rest of the State [pay] *paid* only $6.64 (Ex. 118); this five to one disparity would *have been* [be] even greater if capital investment were included (Tr. 3948-48A).

(96) The greater per capita spending for mass transit in New York City is inexorable.

(97) Since 57 percent of the resident labor force uses public transportation to get to work, and since public transportation carries 56 percent of the 3 million persons (including non-residents) who enter the central business district each day, mass transit is essential to the functioning of New York City; and without a substantial City subsidy, the mass transit system cannot function (Ex. 73, Tr. 3952). (IV 1787; V2049-50).

Parks and Recreation

(98) Syracuse spends five times more per capita for parks and recreation than its surrounding villages and towns (Tr. 5053). (V 2289a, 2291a).

(99) Rochester spends almost three times more per capita than its suburbs (Ex. 79). (IV 1794).

(100) This greater per capita spending for parks and recreation is inexorable.

(101) For city residents, more of whom are poor, unemployed or elderly, a nearby park often provides the only access to fresh air, recreation and relief from the dirt, congestion and stress of city life; this is especially true for Syracuse's elderly population, 75 percent of whom live below the poverty level (Tr. 5059-63, 5072-75, 4245). (V 2292-95, 2298-2301, 2141-42).

(102) With Syracuse's crime rate twice that of the surrounding towns and villages and even higher among youth, park and recreation opportunities are needed to provide constructive outlets especially during summer months (Tr. 5063-64). (V 2295-6).

(103) The disparity in spending between Syracuse and its suburbs is also a product of the 1.7 million dollars spent by Onondaga County—40 percent of whose taxpayers are Syracuse residents—on parks and recreation facilities located entirely in the suburbs (Tr. 5056, 4199-4200). (V 2291, 2125-26).

(104) While suburban residents have ready access to these county facilities, lack of public transportation and poverty prevent many city residents from using them (Tr. 4200-02, 4244-45, 5061, 5072-75). (V 2126-27, 2140-41, 2294, 2298).

Housing

(105) Each of the four cities must subsidize public housing projects for low income residents, a burden that most suburban and rural jurisdictions do not have (Tr. 4681, 4691, 4697-98, Ex. 139). (V 2234, 2238, 2240-41, 2251).

(106) In Erie County, 89 percent of the public housing units are located in Buffalo; Rochester has built 3,700 public housing units for the elderly while its surrounding towns have constructed only 200 (Ex. 139, Tr. 3679). (V 2251, 1983-4).

(107) The four cities must pay operating deficits on State-sponsored housing projects in their cities; New York City's payments exceed $30 million (Tr. 4698-4700, 4696-97). (V 2241-42, 2239-41).

(108) In addition, the cities must bear indirect costs because public housing projects need greater police, fire and sanitation services while producing reduced tax revenues from payments in lieu of taxes and tax preferences (Tr. 4702-03, 4706-07, 4708-09, 3680, Ex. 140). (V 2243-47, 1984, 2252).

(109) The greater level of spending for public housing in the four cities is inexorable because of housing shortages for low income persons.

(110) Buffalo's dwelling unit vacancy rate has been below 2 percent when according to Federal criteria any rate below 3 percent is critical (Tr. 4687-90). (V 2236-40)

School Construction

(111) The cities' costs of constructing school buildings—both site acquisition and basic construction—are much higher than in suburban and rural districts; between 1965-66 and 1972-73, New York City's average site cost per acre was 224 times greater than in rural counties; Rochester's cost was 68 times higher (Tr. 4532-34, Ex. 134). (V 2208-09, 2224); basic school construction costs are also higher in New York City (Tr. 4533, 4540, Ex. 135a). (V 2210, 2225).

(112) The higher level of spending for school construction in the four cities is inexorable.

(113) It reflects the greater cost of land, labor and materials in the State's urban areas (Tr. 4542). (V 2211).

(114) The State's mandate that "prevailing wages" must be paid on contracts minimizes the city districts' capacity to cut construction costs (Tr. 4554, 4657-58) (V 2212, 2219-19a; *Labor Law, § 220, subd 3*).

(115) These regional cost differentials are largely ignored by the State's building aid formula, which provides no aid for costs above statewide averages (Tr. 4562). (V 2212).

(116) As a result, intervenors suffer greater cost disapprovals than other districts, and intervenors are required to utilize a greater portion of local revenues for capital outlays and debt service (Ex. 137, 138, Tr. 4565, 4570-74, 4670). (V 2227-30, 2231-33, 2213, 2214-16, 2220).

State Mandates

(117) In addition to public assistance, Medicaid, courts and corrections spending mandated by State law, other greater non-school spending by New York City is required by State law.

IFF 118 deleted by Trial Judge.

(119) State "death gamble" laws—which provide that where a policeman or fireman of retirement age dies on the job, he is presumed to have retired the day before his death—cost New York City millions of dollars each year in increased benefits for the decedent's family (Tr. 5461-65, e.g., General Municipal Law, § *207-g and* § 207-h *ante and post* (V. 2468-70)

(120) State laws, which require New York City to calculate pension benefits for firemen, policemen and sanitation workers based on final salary instead of average salary over a few years, have increased City expenditures by tens of millions of dollars a year (Tr. 5466-69, 5479, e.g., N.Y.C. Admin. Code

§ B18-45.0-3). (VI 2471-73, 2475) (§ *B19-4.0, subd h; § B3-36.5, subd i*)

(121) The "heart" law, which presumes that any heart attack suffered by a New York City policeman or fireman occurred in the course of duty, costs the City $17 million per year (Tr. 5473, e.g. Retirement and Social Security Law § 363-a, *as extended by L 1981, ch 381, § 6*). (VI 2474)

(122) Section 220 of the Labor Law, which requires New York City to pay all City plumbers, carpenters and craftsmen the wage prevailing in New York City construction trades, costs the City annually $20 million in extra compensation for its 10,000 craft employees (Tr. 5483). (V 2475-6)

(123) A State law, which authorizes New York City sanitation workers to take unlimited sick leave each year, costs New York City several million dollars each year (Tr. 5486-88) (VI 2476) (N.Y.C. Admin. Code § 752-7.1).

(124) A State law that permits New York City's public higher education teachers to use in part accumulated sick leave as terminal leave doubles terminal leave benefits and costs the City millions of dollars each year (Tr. 5488-89, Education Law, § 3107). (VI 2476-7)

(125) Under Civil Service Law § 23, the State Civil Service Commission helps localities with personnel functions such as classifications, examinations and training; New York City's efforts to obtain these State services—for which the City spends $4 million a year—have been rejected (Tr. 5498, 5503-04). (VI 2478-80)

(126) New York City spends millions of dollars in training policemen and firemen while the State trains such officials for other jurisdictions without charge (Tr. 5504-05) (VI 2479-80).

(127) The New York Department of State provides to local governments other than New York City technical assistance, management analysis, labor relations and other services, for which New York City spends in excess of $20 million a year (Tr. 5505). (VI 2480)

(128) The State police bring law enforcement to rural New York, but not to New York City (Tr. 5506) (VI 2480-81).

(129) State laws have required Syracuse to reduce its work week for firemen from 58 hours to 40 hours, costing Syracuse millions of dollars in additional compensation (Tr. 4196, McKinney's Unconsolidated Laws § 1015). (V 2123)

(130) A law compelling arbitration of labor issues involving uniformed policemen and firemen has resulted in the imposition of costly wage settlements on the upstate cities (Tr. 4216-17, 3918-19, 3774, Civil Service Law § 209) (V 2133, 2041-2, 2007)

IFF 131-137 deleted by Trial Judge.

D. Miscellaneous

(138) *In 1975-76* New York City [has] *had* 47 percent of the State's pupils with special educational needs, 31 percent of the State's public school population, but [receives] *received* only 26 percent of the State's education *operating* aid (Tr. 15818, 15820-23). ***In 1979-1980 (the year used to calculate 1980-1981 aid) New York City had 51% of the State's pupils with special educational needs, 32% of the State's public school enrollment; but in 1980-1981 it received only 29% of the State's education operating aid* (SED 1980-81 SA 124 Rept., ED No. 239, 3/4/81; SED, Public School Enrollment and Staff, New York State 1979-80). In 1980-1981 (the year used to calculate 1981-1982 aid) New York City had 51% of the State's pupils with special educational needs, 33% of the State's public school enrollment; but in 1981-1982 it will receive only an estimated 29% of the State's education operating aid (SED 1981-82 State Aid Projections, SA091-2, DB Ed 3151, 9/16/81; SED Public School Enrollment and Staff, New York State 1980-81; SED data 9/21/81).***

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* *See IFF 2A above for the aids now provided separately from operating aid which in 1974-1975 did not exist or were included within operating aid.*

(139) Chapter 241 of the 1974 Laws of New York [has] *did* not increase[d] the city districts' share of the State's operating expense aid (Tr. 15828-29, 15834, 21492). *In 1974-1975 the intervenors' share of the total State operating aid was 30.9% (SED Computer Run #003, 3/15/76). In 1980-1981 the intervenors' share was 32.7%** (SED 1980-81 SA 124 Rept., ED No. 239, 3/4/81). In 1981-1982 the intervenors' share will be an estimated 32.9%. Under the first tier of the operating aid formula, based upon real property wealth, the intervenors' share will be an estimated 33.8% of State total first tier operating aid; under the second tier of the operating aid formula, based upon adjusted gross income, the intervenors' share will be an estimated 27.8% of State total second tier operating aid (SED 1981-82 State Aid Projections, SA091-2, DB Ed 315I, 9/16/81).*

(140) In 1974-75, the four intervening districts received State operating expense aid per pupil unit as follows: Rochester, $455: New York City, $596; Buffalo, $812; Syracuse, $589; the average New York State district outside the largest four cities received $676 in aid per pupil unit; some districts received more than $1,000 (Ex. 82, 244, also derived from Ex. 29). *In 1980-1981, Rochester received $797; New York City, $866; Buffalo, $1,024; Syracuse, $892, while the average for the rest of the State was $945 (SED 1980-1981 SA 124 Rept., Ed No. 239, 3/4/81). Operating aid as of 1980-1981 was redefined to exclude aid for the non-severely handicapped. By 1980-1981 categorical aids for incentive grants for improving pupil performance, diagnostic screening and removal of unsafe asbestos were added (L 1980, ch 53, §§ 19-22, 33-37; L 1978, ch 53 § 1; Education Law, § 3602, subds 19-21; § 3208, subd 6). In 1981-1982, Rochester will receive an estimated $826; New York City, $931; Buffalo, $1075, Syracuse, $935, while the average for the rest of the State will be $1000 (SED 1981-82 State Aid Projections, SA091-2, DB Ed 315I, 9/16/81).*

** *See footnote to IFF 138.*

(141) New York City, Buffalo, Rochester and Syracuse levy property taxes at about the limit imposed by the State Constitution (Tr. 2828, 4213, 3702-03A). (IV 1768; V 2132-33, 1990-91)

IFF 142 deleted by Trial Judge.

(143) To raise non-property taxes the cities would have to obtain the Legislature's permission, which authorizations have not been forthcoming in recent years (Tr. 2828-29, 4213). (IV 1768-9; V 2132)

IFF 144-145 deleted by Trial Judge.

(146) The four cities' levels of spending and employees for the common municipal functions are comparable to those of cities of similar size across the country (Ex. 90-97). (IV 1808-15)

III. (147) THE AID STATUTE OVERSTATES THE CITIES' ACTUAL CAPACITY TO FINANCE THEIR SCHOOLS FROM LOCAL REVENUES IN DISREGARDING THE REDUCED PURCHASING POWER OF THE URBAN EDUCATION DOLLAR.

A. (148) The Purchasing Power of the Education Dollar is Sharply Reduced in Metropolitan Areas and Particularly Downstate.

(149) The average expenditure per pupil for the minimum education program of a typical school district downstate is $1,652 while the upstate cost is $1,123, a difference of 47% (Ex. 227, p 6) (X 5016)

(150) The average expense for a suburban-urban typical metropolitan area district is $1,484 while rural districts spend $1,147, a difference of 29% (Ex. 227, p.6). (*Id.*)

(151) Large urban centers generally have higher living costs than non-metropolitan areas (Tr. 9730-31, 9859, Ex. 166A). (VIII 3642-43, 3659, 3671)

(152) A typical market basket of goods—as defined by the Bureau of Labor Statistics of the Department of Labor—costs far more in the metropolitan area than it does in the non-metropolitan areas (Ex. 166A, B) (VIII 3671-2)

(153) Next to Boston, the New York City metropolitan area has the highest living cost in the entire nation (Tr. 9723, Ex. 166A) (VIII 6341-42, 6371)

(154) New York City's private sector wages are higher than wages elsewhere in the State (Tr. 9781-83, Ex. 166I, Ex. 205). (VIII 3643-45, 3679; IX 4313)

(155) Salaries for teachers, the largest component of school costs, are higher downstate and in the metropolitan areas (Tr. 11399-400, 18891) (VIII 4081-82, X 4760).

(156) The average 1974-75 salary for classroom teachers in the New York City metropolitan area was $16,498 while the average salary upstate was $12,737, a difference of 30% (Ex 214) (IX 4316).

(157) Median salaries for teachers by degree and experience level show that downstate districts must pay more than upstate to purchase the same educational resource (Tr. 11,226, Ex 189) (VIII 4060, 4136).

(158) The higher teacher costs and school expenditures downstate and in metropolitan areas are the product of many factors including (a) the "opportunity cost" of becoming a teacher—the wage rates in alternative occupations; and (b) the greater concentration of school districts, which increases competition for teachers, *and has driven* [driving] up wages (Tr. 17971, 19929-32, 13146, Ex. 217) (XI 5677, 5732-35; IX 4278, 4319-20)

B. (159) Additional Factors Require Intervenors to Pay Higher Teacher Compensation.

(160) Large city school districts have to pay more to maintain teacher quality against the hiring competition of other school districts.

(161) Contributing to this are such conditions as: large classes with a high percentage of economically and educationally disadvantaged children; deteriorating buildings with limited materials and supplies; the violence and vandalism in many city schools, (such as to require police and school corridor monitors) (Tr. 9251-53, 9260, 9382, 10061, Ex. 167) (VIII 3585-86, 3588, 3620, 3742, 3759-78).

(162) [The] *New York City has 78.2% and the* four intervening districts *combined* have 84.4% of the minority students in New York State (Ex. 147, Table 2) (V 2398, 2400)

(163) Studies have shown that as the percentage of minority pupils in a district increases teacher salaries also increase, all other factors remaining constant (Tr. 17983-84, 17986-88, 18034-35) (XI 5678-9, 5680-81, 5693-94); these data confirm that because many teachers prefer not to teach in districts with a large percentage of minorities, districts with a disproportionate number of minority pupils have to pay higher salaries to teachers in order to attract and retain teachers (*id.*, see also Tr. 13146). (IX 4278)

(164) Over the years the cities have had to make costly efforts to attract and retain teachers.

(165) Since the middle 1960s the Syracuse Board of Education has had a policy of maintaining a salary schedule higher than its suburbs in order to compete effectively for teacher applicants (Tr. 9261-62, 9272-74, Ex. 165A-E). (VIII 3488-89, 3591-94, 3611-15)

(166) New York City's high teacher salaries relative to the rest of the State have been essential to its hiring effort, receiving strong emphasis in advertising and recruiting (Tr. 10064, 10068-69, Ex. 169) (VIII 3743-5, 3779, 3781).

(167) In addition to greater direct compensation, the cities have used other expensive techniques to attract teachers such as extra pay for teaching in inner city schools, special training programs for inner city teaching including tuition subsidies for further academic training, recruiting personnel throughout the

country including Peace Corps and Teacher Corps members (Tr. 9275-79, 9291, 10080-82). (VIII 3593, 96-97, 3745-47)

IFF 168 deleted by Trial Judge.

(169) The cities suffered even greater recruiting problems because many teachers preferred teaching in the suburbs (Tr. 9383, 9258-59, 10631, 10627). (VIII 3621-22, 3586-87, 3876-77)

IFF 170 deleted by Trial Judge.

(171) In New York City, among thousands of teachers laid off with recall rights, more than half have refused reinstatement because the job offers are in inner city schools (Tr. 10058-59) (VIII 3741-42)

(172) Heavy teacher absenteeism, an inability to secure substitutes, and frequent requests to transfer out of the inner city schools contribute to the staffing difficulties in the inner city schools (Tr. 9393, 9296-98, 10113, 10052-53, 9391-92, 9405A). (VIII 3622-4, 3599-600, 3755, 3759-60, 3624)

(173) The cities are unable to attract sufficient numbers of music, art, industrial arts and special education teachers (Tr. 9377, 10083-84). (VIII 3618-19, 3747-48)

IFF 174-178 deleted by Trial Judge.

IV. (179) THE AID FORMULA'S MEASUREMENT OF DISTRICT AID BY PUPIL ATTENDANCE OVERSTATES THE CITIES' ACTUAL FISCAL CAPACITY AND DOUBLY PENALIZES THEM FOR THEIR ABSENTEEISM BURDEN.

(180) Chapter 241 of the Laws of 1974 [measures] *measured* a district's capacity to finance public education by dividing a district's real property valuation by the number of resident students in average daily attendance; a district's aggregate aid [is] *was* then computed by multiplying that aidable pupil unit figure by the district's weighted average daily attendance. *Since 1979-1980 the pupil denominator in the wealth measure has been total wealth pupil units (TWPU) and for aid distribution*

has been total aidable pupil units (TAPU), which differs from TAPU in 1974-75 by the addition of weightings for PSEN and secondary PSEN. Both TAPU and TWPU are based upon average daily attendance (L 1980, ch 53, §§ 12, 14; L 1981, ch 53, § 16, 21, 22; Education Law, § 3602, subds 2-b, 8, 9).

(181) The use of average daily attendance instead of enrollment at these two important points in the formula resulted in 1974-75 in an operating aid loss of $206,287,204 in the four cities (Ex. 185, 201, Tr. 11140-42, 11469-71). (VIII 4119; IX 4301-02; VIII 4045-47; IX 4165)

A. (182) The Four Cities Have the Highest Rates of Absenteeism in the State.

(183) High student absenteeism is a big city problem; among the larger cities in the nation. (Ex. 182A, Tr. 11090-93). (VIII 4104-05, 4039-42)

(184) In New York State student absenteeism is far more prevalent in the schools of the large cities than elsewhere; the 84% average attendance rate of the State's five largest cities is almost 10 percentage points lower than the 93.83% rate of the rest of the State (Ex. 181A, Tr. 11056-59) (VIII 4099, 4034-37)

(185) The cities' high rates of absenteeism have been relatively consistent in recent years and are most acute in the secondary schools (Tr. 11063, 11064 Ex. 181B-E). (VIII 4037-39, 4100-103)

B. (186) High Rates of Student Absenteeism Necessitate Extra Costs.

(187) Different children are absent on different days, and the school systems must plan and spend equally for all students including those whose attendance is irregular (Tr. 9990-92, 11469, 22636-38, 6853, 9000, 7837-38, 8345). (VIII 3709-11; IX 4165; XII 6251-53; VI 2924; VII 3483, 3188-89, 3310)

(188) The cities' high rates of absenteeism necessitate extra costs; Buffalo, New York City and Rochester in 1972-73 spent

three to six times as much per pupil for attendance services as other districts (Ex. 183A) (VIII 4114); in 1974-75, Rochester had 13 times as many attendance officers per 1000 pupils as the rest of Monroe County (Ex. 183B). (VIII 4115)

(189) High absenteeism generates the need for additional, costly repetition and remediation programs to assist children whose learning is impaired by irregular attendance (Tr. 8153-54, 9000-02, 9992, 16389-90) (VII 3265-66, 3483-85; VIII 3711; XI 5452-53)

C. (190) Use of Attendance in the Aid Formula Does Not Promote Increased Attendance Because the High Absenteeism Rates of the Cities Are Inexorable.

(191) High absenteeism stems primarily from poverty and conditions associated with poverty and is practically beyond remediation in the cities given their present resource limitations.

(192) Poor children have a higher incidence of illness which keeps pupils from attending schools (Tr. 5571, 7035, 9996-97) (VI 2496, 2973; VII 3713-14),

(193) Poor students often lack warm clothing for cold weather (Tr. 5550-51, 6778-82, 8741) (VI 2486-87, 2918-21; VII 3396).

(194) Home and neighborhood conditions discourage attendance in poverty areas; Poor parents are more likely to have to keep older children home with pre-schoolers when the parents are sick or babysitters fail (Tr. 7034-35, 8741, 9621, 16394) (VI 2972-73; VII 3396; VIII 3634; XI 5455-56).

(195) Many poor children lack the parental encouragement to attend school that middle class children receive (Tr. 8006-12, 8189-90, 8754-55, 5571). (VII 3238-43; 3279-80, 3404-05; VI 2496-97).

(196) Absenteeism is often a product of impaired mental and emotional health which occurs more often among poor children (Tr. 6041-6108, 6872-78) (VI 2655-96, 2930-35); atten-

dance problems are frequently a product of stress, and stress affects poor children disproportionately both because of fear of school demands for which they are ill prepared, and because of anxiety of what they may find when they return home (Tr. 6877-78) (VI 2934-35).

(197) Attendance rate differences within New York City schools can be predicted with 85% accuracy from four socio-economic variables; poverty (the percentage of female-headed families with family incomes below the poverty level); wealth (the percentage of families with incomes above $15,000); pupil turnover among the schools; and dependency (percentage of total population under 18 and over 64 years of age) (Ex. 202, 203A-E, Tr. 11472-505) (IX 4303, 4304-08, 4167-90).

(198) The greater the incidence of poverty, transiency and dependency, the lower the rate of attendance; conversely, the greater the number of well-to-do families the better the attendance (Tr. 11487-98, 11523-25, 13128-39, Ex. 203A-E, 216) (IX 4176-85, 4204-05, 4266-73, 4304-08, 4318).

(199) Poverty is also the most important factor in explaining variation in attendance rates among 40 of the nation's largest cities (Ex. 182B, G. Tr. 11101-03) (VIII 4106, 4108, 4113, 4143-45).

(200) Lack of success in school, far more prevalent in the cities, diminishes motivation to attend (Tr. 16376, 10459) (XI 5447-48; VIII 3847).

(201) Motivation is sapped by the limited program in city schools (Tr. 8990-93, 9621-22) (VII 3478-80; VIII 3634-35).

(202) With the present level of support services in New York city, the number of attendance teachers in the City has virtually no impact on attendance rates (Tr. 11501-05, Ex. 203F) (IX 4186-90, 4309).

(203) For a Manhattan attendance officer to bring about additional State aid equivalent to his salary, the officer would have to generate additional attendance of 58 students each day of the school year or [10,490] *10,440* student days per year;

given the poverty causes of absenteeism the most dedicated attendance officer cannot achieve this result (Ex. 183C, Tr. 11525-26) (VIII 4116; IX 4203-04)

IFF 204-210 deleted by Trial Judge.

(211) The defendant Regents recently recommended to the Legislature the use of a pupil count factor based 50% on average daily membership and 50% on average daily attendance in both the ability and need parts of the aid formula to produce "greater equity" (Ex. 248, pp. 12, 13) (X 4961-62).

IFF 212-213 deleted by Trial Judge.

V. (214) Although burdened with the greatest concentration of special need students, the City districts receive smaller State aid supplement for such students than do other districts.

A. (215) The State Formula Discriminates Against the Cities By Its Reduced Extra Aid for Their Disadvantaged and Non-Severely Handicapped Students.

(216) Under Chapter 241, *in 1974-1975* "disadvantaged" students with special education needs ("PSEN") [are] *were* weighted 1.25 and students with (non-severely) handicapping conditions [are] *were* weighted 2.0. *Under current law PSEN students are weighted 1 25. Under an excess cost formula pupils with handicapping conditions are weighted as 2.7 if they have been found by a committee on the handicapped to require: (1) placement for at least 60% of the school day in a special class, or (2) home or hospital instruction for more than 60 days or (3) special services or programs for more than 60% of the school day. They are weighted as 1.9 if they have been found to requre: (1) placement for 20% or more of the school week in a resource room, or (2) special services or programs 20% or more of the school week. Children are weighted as 1.13 if they have been found to require two or more periods a week of special instruction either in speech or in other special programs or services. Aid for pupils with handicapping conditions is calculated by applying the aid ratio used in the first tier of the operating aid formula (L 1980, ch 53, §§ 13, 19; L 1981,*

ch 53, § 32; Education Law, § 3602, subds 9, 19), as is more fully set forth in IFF 362-B below.

(217) By the statute's count of PSEN students, 52% of them in 1974-1975 attended schools in the four city districts wherein 36% of the State's pupils were enrolled (Ex. CQL, p. 147, 164A). *In 1979-1980, with secondary PSEN included, 56% of the PSEN students attended schools in the four city districts where 36% of the State's pupils were enrolled (SED 1980-1981 SA 124 Rept., ED No. 239, 3/4/81; SED Public School Enrollment and Staff, New York State 1979-1980). In 1980-1981, with Secondary PSEN included, 56% of the PSEN students attended school in the four city districts where 37% of the State's pupils were enrolled (SED Public School Enrollment and Staff, New York State 1980-1981; SED Data 9/21/81).*

(218) *In 1974-1975,* New York City alone had almost 47% of such "below minimum competence" students *(Ex. CQL, p. 147, 164A). In 1979-1980, with secondary PSEN included, New York City had 51% of such "below minimum competence" students (SED 1980-1981, SA 124 Rept., ED No. 239, 3/4/81). In 1980-1981, with secondary PSEN included, New York City had 51% of such "below minimum competence" students (SED data 9/21/81).*

(219) 53% of the State's pupils with handicapping conditions in 1974-1975 were enrolled in the intervenors' schools (Ex. CQl, p. 147). *In 1979-1980, with an expansion of those counted as handicapped, 42% of the State's pupils with handicapping conditions were enrolled in the intervenors' schools, including 56% of the "60 percent/day" pupils, 29% of the "20 percent/week" pupils and 13% of the "2 periods/week" pupils (SED 1980-1981 SA 124 Rept., Ed No. 239, 3/4/81). In 1980-1981, 44% of the State's pupils with handicapping conditions were enrolled in the intervenors' schools, including 57% of the "60 percent/day" pupils, 32% of the "20 percent/week" pupils and 24% of the "2 periods/week" pupils (SED data 9/21/81).*

(220) The extra weighting of .25 for each PSEN student and 1.0 for each pupil with a handicapping condition *under chapter 241* [is] *was* applied to intervenors' reduced aidable pupil unit amounts (see findings 2, 3, 147, 179, above). *Under current law the extra weighting of .25 for each PSEN student is applied to what the trial court found to be intervenors' reduced aidable pupil amounts. The weightings for pupils with handicapping conditions are applied to what the trial court found to be intervenors' reduced aidable per pupil amounts under the aid ratio used in the first tier of the operating aid formula (L 1980, ch 53, § 19; L 1981, ch 53, § 22; Education Law, § 3602, subd 19).*

(221) As a result, the additional .25 weighting for disadvantaged students applied to Rochester's per pupil aid in 1974-1975 yielded it only $114 more aid per disadvantaged pupil; by contrast, the extra .25 weighting yielded an additional $267 per child for a district like Salmon River (Ex. 82, derived from Ex. 29). *The additional .25 weighting for disadvantaged students applied to Rochester's aid in 1980-1981 yielded it only $199 more aid per disadvantaged pupil; by contrast, the extra .25 weighting yielded an additional $376 per child for a district like Salmon River (SED 1980-1981 SA 124 Rept., ED No. 239, 3/4/81). The additional .25 weighting for disadvantaged students applied to Rochester's aid in 1981-1982 yielded it only $207 more aid per disadvantaged pupil; by contrast, the extra .25 weighting yielded an additional $410 per child for a district like Salmon River (SED 1981-1982 State Aid Projections, SAO91-2, DB Ed 3151, 9/16/81).*

(221-A) The extra 1.0 weighting for students with handicapping conditions *in 1974-1975* provided only an additional $455 per child in Rochester, while Salmon River was eligible for $1,067 (Ex. 82, derived from Ex. 29). *The additional aid in 1980-1981 for students with handicapping conditions who require special programs 60% or more of each school day is only $1,735 in Rochester, while the figure is $2,939 in Salmon River; for those requiring special programs 20% or more of each week, the per pupil aid figures are $918 in Rochester and*

$1,556 in Salmon River; for those requiring special programs two or more periods a week, the per pupil aid figures are $133 in Rochester and $225 in Salmon River (derived from SED 1980-1981 SA 124 Rept., ED No. 239, 3/4/81). The additional aid in 1981-1982 for students with handicapping conditions who require special programs 60% or more of each school day is only $1,873 in Rochester, while the figure is $2,998 in Salmon River; for those requiring special programs 20% or more of each week, the per pupil aid figures are $992 in Rochester and $1,587 in Salmon River; for those requiring special programs two or more periods a week, the per pupil aid figures are $143 in Rochester and $229 in Salmon River (SED data 9/21/81)

(222) Because of the formula's application of the weightings to the cities' reduced aidable pupil unit amount, intervenors [lost] *were deprived of* some $26 million in State aid in 1974-1975 (Ex. 196) (VIII 4142).

B. (223) The State Formula's Secondary Weighting Provision Discriminates Against City Districts.

(224) The State's operating expense aid law recognizes the greater costs for secondary school students by weighting them .25 more than elementary school students (*L 1974, ch 241, § 6).* A minimal education of secondary school students in a typical district costs approximately 30% more than such education of an elementary school student (Ex. 227, p. 4) (X 5014).

(225) However, Chapter 241 [fails] *failed* to provide the .25 secondary weighting for disadvantaged and handicapped students attending secondary school. *Under current law, secondary school PSEN students and those handicapped pupils weighted as 1.13 pupils now receive the additional .25 secondary weighting, but certain other categories of students are excluded from the secondary weighting (L 1980, ch 53, §§ 14, 17; L 1981, ch 53, § 23, Education Law, § 3602, subds 9-a, 17).*

(226) Educating disadvantaged and handicapped students requires not only the extra expenditures needed to overcome

their special problems but the same additional costs that all secondary education entails.

(227) Remedial services for disadvantaged students, whether provided as a supplement to the normal curriculum or in special alternative programs, are more expensive than traditional secondary programs (Tr. 9617) (VIII 3632).

(228) Students with handicapping conditions must receive more expensive services; brain injured children become much more difficult to manage and need smaller classes when they reach junior high age (Tr. 9147-49) (VII 3513-15).

(229) Being in secondary school in no way diminishes the need for costly compensatory or special education—if anything the need is greater.

(230) The burden of the statute's failure to provide the secondary weighting for disadvantaged and non-severely handicapped students [falls] *fell* most heavily on the city school districts because they have the highest concentrations of such students at the secondary level.

(231) Because of the exclusion of disadvantaged and non-severely handicapped students *in 1975-1976*, only 46% of the five largest cities' secondary school students [are] *were* eligible for the .25 secondary weighting; by contrast, 79% of the secondary school students elsewhere in the State [are] *were* eligible for the .25 weighting (Ex. CQ1, p. 151). *Under current law, disadvantaged students are provided the secondary weighting (L 1980, ch 53, §§ 14, 17; L 1981, ch 53, § 23; Education Law, § 3602, subds 9-a, 17); because of continued exclusions of other students, in 1980-1981 84% of the five largest cities' secondary school students were eligible for the .25 secondary weighting; by contrast 93% of the secondary students elsewhere in the State were eligible for the .25 weighting (derived from SED 1980-1981, SA-124 Rept., ED No. 239, 3/4/81).*

(232) The consequence [is] *was* that *in 1975-1976* the five largest cities [receive] *received* only 18% of the total amount

apportioned under the secondary weighting formula as compared to 30% of the State's total payable operating aid (Ex. CQ1, P. 152). *In 1980-1981 the five largest cities received only 28% of the total amount apportioned under the secondary weighting formula as compared to 33% of the State's total payable operating aid (derived from SED 1980-1981 SA 124 Rept., ED No. 239, 3/4/81).*

IFF 233 deleted by Trial Judge.

(234) As a result of the formula's failure to provide a secondary weighting for disadvantaged and non-severely handicapped students, the four intervenor districts in 1974-1975 were denied $31,302,698 in aid (Ex. 188, Tr. 11220-25). *As a result of the formula's failure in 1980-1981 to provide a secondary weighting for certain categories of students, the intervenor districts were denied $12,189,186 in aid (derived from SED 1980-1981 SA 124 Rept., ED No. 239, 3/4/81).*

C (235) Denial to the Cities of a BOCES Aid Formula for Non-Severely Handicapped and Occupational Education Students [Reduces] *Reduced* Aid for These Students *in 1974-1975. The BOCES Aid Formula No Longer Applies to Handicapped Students, But is Unchanged in Its Application to Occupational Education Students.*

(236) All of the State's districts except the five largest cities are eligible to participate in a BOCES (Board of Cooperative Educational Services).

(237) *In 1974-1975* [A]*a*id for the five largest cities' non-severely handicapped students in the form of an extra weighting of 1.0 [is] *was* a fixed sum unrelated to the actual costs incurred by the city districts, whereas the BOCES aid formula offered the remainder of the State's school districts [provides] *provided* them the option of unlimited aid for allowable costs on an "8 mill" or "aid ratio" basis (Ex. 186A).

(238) Non-city districts [have] *had* the option to choose the 1.0 weighting instead of BOCES if that [provides] *provided* them more aid (Tr. 11159).

(239) If intervenor districts were not barred from receiving aid under the BOCES formula for their non-severely handicapped pupils, they would have received in 1974-1975 over ten million dollars in additional aid (Ex. 186B-E as amended, Tr. 11160-62) (VIII 4122-33, 4048-50)

(240) The cities have the highest concentrations of occupational education students in the State; for example, the percentage of high school occupational enrollment in the three upstate cities runs two and three times that of their suburbs (Ex. 187, Tr. 11216-18) (VIII 4134, 4054-56).

(241) With respect to such students, the less favorable "Special Services Aid" formula for intervenors results in reduced aid; had the cities received aid for occupational education students under the BOCES formula provided the rest of the State's districts, they would have received in 1974-1975 over 15 million dollars in additional aid (Ex. 186B-E as amended). *In 1980-1981, occupational education aid for intervenors would have been more than $12 million greater under the BOCES formula. As a result of the 1981 legislative change (L 1981, ch 53, § 29; Education Law, § 3602, subd 17, par b) for special services aid, occupational education aid for intervenors would be $5.7 million greater under the BOCES formula.*

IFF 242 deleted by Trial Judge.

(243) The defendant Board of Regents [have] *has* recognized that denial to intervenors of the more favorable BOCES aid formula is inequitable (Ex. 248, p. 4) (X 4961).

(244) Based upon the foregoing findings, it is found that the aid formula defeats the statute's underlying equalization purpose in (1) its disregard of the reduced tax revenues available in the cities for the schools because of their severe municipal overburdens; (2) its disregard of the reduced education purchasing power of their school dollars, because of higher urban costs; (3) its disregard of their student absenteeism burden, for which they are actually penalized by reduction of State aid; and (4) its reductions of the amounts of supplemen-

tal assistance for each special need student, though it is the city districts that have the highest concentrations of such students.

(245) The inequity of the aid formula inflicts upon the four intervenor districts a deprivation of State aid.

VI. (246) IN YIELDING REDUCED EDUCATION ASSISTANCE TO THE CITY DISTRICTS THE STATE AID FORMULA ESSENTIALLY DISREGARDS THEIR MULTIPLE EDUCATIONAL OVERBURDENS LEAVING THEM UNABLE TO REMEDY THE HIGH LEVELS OF ABSOLUTE LEARNING FAILURE AND OF SEVERE UNDERACHIEVEMENT AMONG THEIR STUDENTS.

A. (247) The Cities Have the Greatest Concentration of Poverty and of Pupils From Poverty Homes (e.g., Tr. 2885, 3486, 3655, 4191, Ex. 69) (IV 1818, 1942; V 1973, 2121; IV 1783).

(248) New York City has a disproportionate number of economically disadvantaged children as measured by welfare dependency; with 43% of the State's population, New York City has 59.6% of the State's female-headed families and 68.1% of the State's individuals living on Aid to Families with Dependent Children (Ex. 151 Tables 17-18; see also Ex. 68, 145) (VI 2739-40; IV 1782; V 2273).

(249) The number of children receiving aid for dependent children in New York City has increased by over 100% from 315,306 to 649,347 in the last ten years (Ex. 163B, Tr. 9177-78) (VII 3575, 3520-21)

(250) Almost 20% of New York City's families are headed by a mother alone; this number has increased 80.8% in ten years (Ex. 163C, Tr. 9178-79) (VII 3576, 3520).

IFF 251 deleted by Trial Judge.

(252) New York City has 31% of the State's public school enrollment but at least 65% of the State's students eligible for

assistance under Title I of the Elementary and Secondary Educational Act (*US Code, tit 20, former §§ 241a-241m)* (Ex. 163E, Tr. 9182-83, 11437-42, 17012-13) (VII 3578, 3523-25, IX 4148-53, 4481-82).

(253) Half of the public school pupils in New York City are eligible for free school lunches because of limited family income (Ex. 163 Tr. 9177-78, 11431-32) (VII 3574, 3520-21; IX 4146-47).

(254) Rochester, Syracuse and Buffalo have among the highest proportions of AFDC and low-income children in the State (e.g., Tr. 17013-14) (IX 4482-83)

(255) In Rochester 42.5% of the elementary school pupils are economically disadvantaged as measured by welfare, low income and foster home status (Tr. 7006-07) (VI 2959-60).

(256) Two thirds of the public school children in Buffalo and one half those in Syracuse receive free school lunches because of low family income (Tr. 9935, 10409) (VIII 3688, 3813).

(257) The numerous learning barriers suffered by city children and the educational overburdens of the city schools are largely the products of poverty (e.g., Tr. 5194-233, 6872-74, 11434-36). (See Finding under section Vi B below.) (V 2302-27; VI 2930-32; IX 4147-48,11434-36.)

B. (258) The Big City School Districts, with the State's Highest Concentrations and Numbers of Disadvantaged Students, Labor Under Eight Major Educational Overburdens Disregarded by the State Aid Formula's Reduced Aid Per Student and Reduced Supplemental Aid Per Special Need Pupil in the City Districts.

1. Impaired Learning Readiness

(259) The cities have a substantial overburden of pupils who enter public schools with impaired learning readiness; this overburden is principally a function of the conditions of life in

urban poverty (Tr. 4290-332, 5194-233, 5368-71, 6270, 7241-42) (V 2152-80, 2302-27, VI 2431-33; VI 2768, 2523-24).

(260) Conditions of life in urban poverty that deprive lower-income children of experiences and tools that create learning readiness include:

(a) lack of toys, books and materials in the home (e.g., Tr. 4291-93, 4309, 4299-300, 5216-17) (V 2152-53, 2164, 2157-59, 2316-18).

(b) lack of direct adult attention and interaction (e.g., Tr. 4294, 4297-98, 4309-17, 4342-45, 5204-05, 5215-17) (V 2154-57, 2164-70, 2181-83, 2308-09, 2316-18).

(c) overcrowding (e.g., Tr. 4297-98, 4318) (V 2156-57, 2170-71).

(d) excessive noise (e.g., Tr. 4297-98, 4304-06, 5229) (V 2156-57, 2160-62, 2324)

and

(e) lack of exposure to Standard English (e.g., Tr. 4294, 4304, 5207-08, 5215-16, 7583-84) (V 2154, 2160-61, 2310-11, 2316-17; VII 3109-10).

(261) The effect of these conditions is to create among lower income children:

(a) greater unfamiliarity with books and writing materials (e.g., Tr. 4291-93, 4299-300, 5216-17, 5597-98, 6874-75) (V 2152-54, 2157-59, 2316-18; VI 2513-14, 2932-33)

(b) greater inability to make refined visual and oral discriminations (e.g., Tr. 4304, 4307-08, 5583-84, 7233-37) (V 2160-61, 2162-64; VI 2504, 2520-23);

(c) greater inability to perform such tasks as recognition of alphabet letters (e.g., Tr. 4296-97, 4300, 5206-07) (V2155-56, 2158-59, 2309-10);

(d) more frequent failure to grasp important learning concepts such as color or time or relational concepts such as "same" versus "different" (e.g., Tr. 4296, 4301-02, 4319, 5208-09, 5572-85) (V 2155, 2159-60, 2171, 2311-12; VI 2497-2506);

(e) more frequent failure to grasp the ideas of sequence and cause and effect (e.g., Tr. 4317-18) (V 2170-71);

(f) more underdeveloped facility in language (e.g., Tr. 4294, 4311-12, 4316-17, 5207-08, 5215-16) (V 2154, 2165-66, 2169-70, 2310-11, 2316-17);

(g) greater discouragement of curiosity (e.g., Tr. 4312-15) (V 2166-67);

(h) greater inability to pay attention for sustained periods of time (e.g., Tr. 4299, 5216-17) (V 2157-58, 2317-18); and

(i) more underdevelopment of memory skills (e.g., Tr. 5204-05) (V 2308-09).

(262) The content of school curricula presupposes that children enter public schools with skills such as those referred to in Finding 261 (Tr. 4298-303) (V 2156-60); and the lack thereof puts children at an immediate disadvantage upon entering school (e.g., Tr. 4291-93, 4331) (V 2152-53, 2179-80).

(263) Lack of learning readiness additionally impairs progress in later years of school because failure to acquire basic skills prevents acquisition of subsequent dependent skills and impairs self-confidence and motivation to learn (Tr. 4308, 4319-28, 5220-22) (V 2163-64, 2171-78, 2319-21).

(264) Impaired learning readiness can be remedied through pre-school education and follow-up programs that include such elements as individualization, small classes, intensive support services, in-service training of staff members, and encouragement of parental involvement, as attested by:

(a) expert witnesses (e.g., Tr. 5371-72, 5383-84, 5427-28 10798-99, 14782-88, 18885) (VI 2433-34, 2441-42, 2459-60; VIII 3903-05; X 4750-51, 4760); and

(b) successful programs described at trial, for example, a Syracuse pre-kindergarten program (Tr. 5374-97) (VI 2434-49), the Early Push pre-kindergarten program in Buffalo (Tr. 10432-33) (VIII 3828-30), the pre-kindergarten program in

Community School District 8 in New York City (Tr. 6742-48) (VI 2900-04), Continuous Progress Education in the early grades in Buffalo (Tr. 6221-53) (VI 2741-63), and Follow Through (Tr. 5771-72, 10765, 14782-88, 18885-86, Ex. 315) (VI 3558-59; VIII 3885; X 4750-60; IX 4569).

(265) Implementation of effective remedial programs costs far more money per student than the regular educational program.

(266) The elements enumerated in Finding 264 involve substantial numbers of additional personnel and are therefore expensive because personnel expenditures account for 85% of the cost of schooling (Tr. 18891) (X 4760-61).

(267) The effective programs described at trial required funds beyond those allocated for regular educational programs; for example, Syracuse's pre-school program costs about $1,100 for a half time daily intervention per child during the school year (Tr. 5381-82) (VI 2439-40) and Follow Through requires an annual additional cost in New York City.

(268) The cities, with their reduced State aid, cannot afford to remedy the lack of learning readiness in all the city children.

(269) The number of disadvantaged children needing pre-kindergarten help in the cities greatly exceeds the number served by existing programs (E.g., Tr. 5351, 5380-81, 10432-33) (VI 2429-30, 2439-40; VIII 3828-29).

(270) Existing curricula of kindergarten and the primary grade in the cities now fail to overcome lack of learning readiness of disadvantaged city children (e.g., Tr. 4323, 5586-87, 5600-03) (V 2174-75; VI 2506-07, 2514-17).

(271) The cities have been forced by funding shortages to cut back or eliminate altogether many of their remedial efforts, including remedial programs cited above such as the Syracuse pre-kindergarten programs (Tr. 5397-99A) (VI 2449-51), Continuous Progress Education in Buffalo (Tr. 10504) (VIII 3858), as well as parts of the regular curriculum such as field trips

(e.g., Tr. 10347-48) (VIII 3807-08), and kindergarten (e.g., Tr. 10492) (VIII 3848).

2. Impaired Learning Progress

(272) The city school districts have a substantial overburden of pupils whose progress throughout school is impaired by the conditions of life in urban poverty (e.g., Tr. 6872-74, 10410-14) (VI 2930-32; VIII 3813-17).

(273) Poverty-related conditions that hamper the scholastic progress of children in city public schools include:

(a) lack of proper food, clothing, medical care and recreation (e.g., Tr. 6872-74, 5376-77, 5875-91, 6722-24, 8166) (VI 2930-32, 2436-37, 2592-2604, 2887-89; VII 3267-68);

(b) parental abandonment, abuse by adults and exposure to violent behavior, drug abuse and alcoholism (e.g., Tr. 6372-82) (VI 2778-84);

(c) overcrowded and noisy living quarters (e.g., Tr. 7429, 8732-38) (VII 3052, 3390-95);

(d) frequent household moves (e.g., Tr. 6087, 6191-92, 9617-18, Ex. 151 Tables 11-13; Intervenors' Brief 101-02) (VI 2682, 2711-12; VIII 3632-34, VI 2730-32);

(e) lack of encouragement and assistance at home concerning school (e.g., Tr. 4327-31, 6369-71, 7848-50, 8727-35, 9940, 10772) (V 2177-80; VI 2776-78; VII 3193-95, 3386-93; VIII 3890);

(f) long hours of part-time work (e.g., Tr. 7428-29, 7848, 8733-35) (VII 3051-53, 3193, 3391-93);

(g) attitudes in poverty neighborhoods that are inimical to school attendance and achievement (e.g., Tr. 5227-28, 6125-30, 8727-29) (V 2323-24; VI 2700-01; VII 3386-88);

(h) intruders and disruptive children within the schools (e.g., Tr. 5223-31, 6885-87, 7442-46) (V 2322-26; VI 2938-40; VII 3059-62).

(274) The effect of these poverty-related conditions upon city children's schoolwork includes:

(a) anxieties and preoccupations that distract from school work or prevent it altogether (e.g., Tr. 6872-74, 7646, 10410-14) (VII 3155; IX 3813-17);

(b) homework impeded or not done, for lack of a suitable place to study at home (e.g., Tr. 6369-71, 7429, 8732-38) (VI 2776-78; VII 3052, 3390-95);

(c) loss of instructional time and other drains on school resources that are diverted to such tasks as diagnosis and placement of newly arriving children (e.g., Tr. 6226-29, 7030-33) (VI 2744-47, 2969-71); and discipline and security (e.g., Tr. 5231 [*see Tr. 5223*, V 2322], 7923-24) (VII 3214-15);

(d) disruption of sequential learning processes (e.g., Tr. 4319-28, 7030-32, 9618) (V 2171-78; VI 2969-71);

(e) narrow range of experience outside school (e.g., Tr. 5217-20, 7848-50) (VII 3193-95);

(f) lack of school attendance (see findings 182-85, 190-201

(g) lack of motivation to attend and achieve in school (e.g., Tr. 4327-31, 5227-28, 7357-59, 8805-06) (V 2177-80, 2323-24; VII 3042-44, 3420-22); and

(h) generally lowered school achievement (see Findings 410-25).

(275) City students disadvantaged by poverty-related conditions have fewer private resources than middle income children and are more dependent on the public schools for assistance in overcoming the problems cited (e.g., Tr. 8186-89) (VII 3276-79).

(276) Even if pre-school education and early-grade compensatory programs were available to all disadvantaged students, additional compensatory education would remain necessary to overcome the continuing effects of urban poverty (e.g., Tr. 10659-61) (VIII 3882-84).

(277) Impaired learning progress due to poverty-related conditions can be remedied through school programs that include such elements as small classes and pupil-staff ratios, continuous in-service teacher training, appropriate curricula, texts and materials, assistance from counsellors, social workers and other support personnel, family outreach and cultural enrichment, as attested by:

(a) expert witnesses (e.g., Tr. 11457-58, 10765-67, 5236-42, 10514-16, 22357-58) (VIII 3885-87; V 2328-33; VIII 3865-67); and

(b) successful programs described at trial such as Project Impact in the South Bronx (Tr. 7595-639) (VII 3122-52), the O'Henry Intermediate School program in Manhattan (Tr. 7895-915) (VII 3195-3209), and New York City's College Bound program (Tr. 8792-803) (VII 3412-20);

(278) Implementation of effective remedial programs and techniques costs far more money per student than the regular educational program.

(279) The elements enumerated in Finding 277 involve substantial numbers of additional personnel and are therefore expensive (see Finding 266).

(280) The effective programs described at trial required funds beyond those allocated for regular educational programs; for example, College Bound cost $1,000 per pupil in 1970-1971 (Tr. 8807) (VII 3422), $950 per pupil in its curtailed form last year (Tr. 8818) (VII 3430), and would have cost $1,500-$1,600 per pupil if services had remained at their 1968 level (Tr. 8907) (VII 3440). (See also, e.g., Tr. 6761-62, 7441, 7602-03, 7610, 7619, 11630-37.) (VI 2913-14; VII 3059, 3127-28, 3132-33, 3138-39; IX 4236-41)

IFF 281 deleted by Trial Judge.

(282) Existing programs in the cities now fail to overcome the impairment of learning progress by poverty-related circumstances, as evidenced by the existence of the conditions reflected in Finding 274.

(283) The number of students in need of alternative education programs, for example, greatly exceeds the number served by existing programs (e.g., Tr. 5650, 9622-23, 11631) (V 2359; VIII 3634-35; IX 4236-37).

(284) Many disadvantaged pupils receive not compensatory education or enrichment, but lesser resources than pupils elsewhere because class size and pupil-staff ratios in the cities are among the largest in the State, while facilities and support services are among the most constricted (see Findings 440-42).

(285) Funding shortages have forced the cities to cut back or eliminate altogether many of their remedial efforts, including the Project Impact, O'Henry School, and College Bound programs cited above (Tr. 7617-19, 7916-52, 8808-22) (VII 3137-39, 3209-35, 3423-33), as well as others (e.g., Tr. 6761-63, 7438-42) (VI 2913-15; VII 3057-60).

3. Impaired Mental and Emotional Health

(286) The Cities have a substantial overburden of pupils suffering from mental and emotional problems; this overburden is principally a function of the conditions of life in urban poverty (e.g., Tr. 6039-114, 6605-22, 6872-78, Ex. 151, 155 Tables 8-18) (VI 2654-99, 2842-55, 2930-34, 2718-40, 2725-40).

(287) One study of the incidence of impaired mental health among city children found, for example, that 23.1% of the Manhattan welfare children studied suffered mental health impairment to a degree requiring immediate psychiatric intervention, compared to 13.5% in a comparison cross-section of Manhattan children and 4.5% of a Westchester County comparison group (Tr. 6053-57, Ex. 151, Tables 1-2) (VI 2660-63; VI 2718-19);

(288) The same study also found that 53.4% of the welfare children compared to only 10% of the Manhattan cross-section had characteristics placing them in a "pathological" profile type (Tr. 6096-105, Ex. 151, Tables 14-15) (VI 2687-94, 2733-37).

(289) Specific causes and factors associated with the city school districts' overburden of impaired mental and emotional health include:

(a) stress and anxiety arising from tensions in the poverty home, material deprivations, and the demands of school on lower-income children who are less prepared to meet them (e.g., Tr. 6872-78, 6956-57, 6091-94, Ex. 151 Tables 11-13) (VI 2930-35, 2953-54, 2684-86, 2729-32);

(b) physical or emotional illness of the child's mother, more prevalent among welfare mothers (Tr. 6078-79, 6093, Ex. 151 Tables 11-13) VI 2676-77, 2685-86, 2729-32);

(c) abandonment, molestation and physical abuse by adults (e.g., Tr. 5758-60, 6372-75, 7659-64) (VI 2549-51, 2778-80; VII 3164-68);

(d) membership in large families, more common among poor people (Tr. 6087-88, 6091-94, Ex. 151 Tables 11-13) (VI 2682-83, 2684-87, 2729-32); and

(e) family transiency, higher among poor people (Tr. 6087-88, 6091-94, Ex. 151 Tables 11-13) (VI 2682, 2684-87, 2729-32).

(290) The effects of these conditions on the mental and emotional health of city school children include:

(a) a higher incidence of mental health impairment sufficiently severe to require immediate psychiatric intervention (e.g., Tr. 6039-57, Ex. 151 Tables 1-2) (VI 2660-61, 2718-19);

(b) a higher incidence of juvenile delinquency (e.g., Ex. 151 Tables 11-13) (VI 2729-30);

(c) greater impairment in school functioning and a higher incidence of mentation problems such as reading difficulties or thinking slowly (e.g., Tr. 6058-64, Ex. 151, Tables 3-5, 11-13) (VI 2663-68, 2720-22);

(d) greater frequency of lower intellectual functioning as measured by IQ (e.g., Tr. 6605-22, Ex. 155 Tables 8-18) (VI 2840-55, 2865-78);

(e) more withdrawn or disruptive behavior in the classroom, often accompanied by poor academic performance (e.g., Tr. 5736-69, 7127-41) (VI 2535-57; VII 2987-97);

(f) more frequent inability to function in school because of personal or family crises (e.g., Tr. 6372-75, 7659-64) (VI 2778-80; VII 3164-68).

(291) School-related problems stemming from impaired mental and emotional health can be resolved or substantially mitigated by mental health programs and trained mental health personnel, as attested by individual witnesses who had successfully dealt with such problems and by effective programs described at trial; for example, Follow Through in New York City (Tr. 5723-69) (VI 2527-57) and the Primary Mental Health Project in Rochester (Tr. 6941-44) (VI 2945-47). (See also, e.g., Tr. 6353-54, 6394-96, 7649-57) (VI 2763-64, 2791-94; VII 3157-63).

(292) The prime need for successful remediation is staff workers sufficient in number to provide individual attention and treatment for troubled children (e.g., Tr. 5794-95, 5787, 6887-88, 7655-57) (VI 2561-62, 2560, 2939-40; VII 3161-63).

(293) Because of the multiplicity and severity of the mental and emotional problems of city children, adequate mental health services cost far more money per pupil than is allotted in an educational program for normal students.

(294) Providing the substantial numbers of additional mental health personnel necessary (see Finding 292) is expensive (see Finding 266).

(295) The effective programs described at trial required funding substantially above that allocated for the regular educational program (e.g., Tr. 6941-44).

IFF 296 deleted by Trial Judge.

(297) The cities, with their reduced State aid, cannot afford to provide mental health programs and personnel at a level

sufficient to overcome or substantially mitigate the school-related problems stemming from the overburden of pupils suffering impaired mental and emotional health.

(298) Mental health programs and personnel have been cut back or eliminated altogether because of funding shortages (e.g., Tr. 6885-86, 6941-44, 9138-42, 9982-83, Ex. 162) (VI 2938-39, 2945-57; VII 3507-10; X 3704-05, 3573).

(299) At current staff levels in the cities mental health workers have unmanageable caseloads, as evidenced by:

(a) the testimony of mental health workers and school administrators (e.g., Tr. 6881-86, 7446-48, 7643-45) (VI 2935-40; VII 3062-64, 3153-55); and

(b) the fact that ratios of pupils to mental health workers in the cities are far in excess of State-recommended levels; for example, while the State Education Department recommends that school systems generally provide one guidance counsellor for each 400-600 elementary students and one for each 250-300 high school students (Tr. 9141) (VII 3509), New York City has only one for each 1,873 elementary pupils, for each 921 junior high students, and for each 666 high school students (Tr. 9138-40) (VII 3507-09); while the State Education Department recommends one social worker and one psychologist for every 1,000 students (Tr. 9143) (VII 3510), Buffalo has one social worker for 12,500 students (Tr. 10496) (VIII 3851) and one psychologist for 5,500 pupils (Tr. 10445) (VIII 3837-38).

(300) In consequence, the problems reflected in Finding 290 continue to exist.

(301) Mental health personnel in the city school districts are unable to respond to all formal referrals (e.g., Tr. 6393, 6736-37, 6776-78, 6970-71, 7127-39, 9150-51) (VI 2792, 2897-98, 2916-18, 2956; VII 2987-96, 3515-17).

(302) They are additionally unable to provide counselling to children in need of it (e.g., Tr. 6887-88, 7140-41, 7830-34) (VI 2939-40, VII 2996-97, 3183-86), or to carry out procedures for

early identification and prevention of mental health problems (e.g., Tr. 6935-36, 9154) (VI 2941-42; VII 3517).

(303) The mental health personnel now working in the city schools are often limited to performing "crisis intervention" in emergencies (e.g., Tr. 6395-96, 6774-75, 7922, 9595, 10496) (VI 2793-94, 2915-16; VII 3212-13, 3571-72; VIII 3851-55).

4. Impaired Physical Health

(304) The cities have a substantial overburden of public school pupils who suffer from impaired physical health, primarily because they have such a high percentage of poverty students.

(305) Poor people generally have greater health and medical problems than the more affluent (Tr. 5833).

(306) For example, persons with the lowest family income are sick in bed more days per year, [as] *than* persons with family incomes over $10,000 per year, and are more likely to suffer chronic conditions disabling them altogether or restricting their ability to work, keep house or go to school (Tr. 5833-35, Ex. 149-50) (VI 2564-65, 2624-25).

(307) Health and medical problems are even more prevalent among impoverished children (Tr. 5836) (VI 2566).

(308) Poor children have two to three times as many traumatic injuries and sick days as more affluent children (Tr. 5837, 5855) (VI 2566-67, 2579).

(309) Low birth weight is two to three times as common among poor infants, and low birth weight children are more susceptible to illness (Tr. 5839-41) (VI 2568-70).

(310) Specific medical problems found by expert witnesses to be disproportionately prevalent among poor children include:

(a) untreated dental decay and loss of teeth (Tr. 5226, 5875-77, e.g., 5998-6000) (VI 2592-94, 2645-47);

(b) uncorrected bad eyesight (Tr. 5863-65, 5881-82a, e.g., 5983-84) (VI 2584-86, 2596-97, 2636-37);

(c) hearing deficiencies, including untreated deafness (Tr. 5884, 7557, 7560-63) (VI 2598, 3091, 3093-96);

(d) speech and voice problems (e.g., Tr. 5883-84, 7564, 19171) (VI 2597-98; VII 3096; XII 5889);

(e) nutritional deficiencies (including overweight, which leads to other diseases), causing failure to thrive and anemia (Tr. 5877-81, 5887-91) (VI 2594-96, 2600-04);

(f) effects of child abuse (Tr. 5842, 9179-82) (VI 2570; VII 3521-24), and

(g) lead poisoning (Tr. 5842, 5870-75, 7558-59) (VI 2570, 2589-92; VII 3092-93).

(311) Poor children also generally receive inferior medical care.

(312) Infant mortality rates (a common health care index) are higher in the four cities than in their suburbs; poor people generally have [two to three] *three to four* times the rate of the nationwide average (Tr. 5837-38, Ex. 71) (VI 2566-68; IV 1785), (*Tr. 5838*) (VI 2567).

(313) Immunization rates are generally lower among poor children (Tr. 5841-42) (VI 2570).

(314) In Buffalo and Rochester 20% fewer children than in their suburbs enter school with the required innoculations (Tr. 7557, 10452-54) (VI 3091; VIII 3841-43).

(315) The reasons for the lower-quality health care received by the poor, as enumerated by expert witnesses, include:

(a) fewer providers of health care for poor people and greater difficulty of access to them (Tr. 5843-47) (VI 2570-74);

(b) complex and fragmented organization of treatment for the poor in clinics and emergency rooms (Tr. 5847-55) (VI 2573-79);

(c) communication difficulties arising from differences in language and culture between the poor and health care providers (Tr. 5858-61, e.g., 5978, 7660) (VI 2581-83, 2633; VII 3165);

(d) lack of follow-up by poor patients and delays in treatment, because of the complexity of the health care delivery system and their own lack of money and education (Tr. 5847-54, 5862-69, 5953, 5979-84, 6007-09, 6017) (VI 2573-79, 2583-88, 2621-22, 2633-37, 2649-52).

(316) The school-related effects of the greater prevalence of health and medical problems among poor urban school children and their lack of good medical care include:

(a) absences caused by illness and by time consumed awaiting medical treatment (e.g., Tr. 5876, 5880-84, 5887, 5976-82; see Finding 192) (VI 2593, 2596-98, 2601, 2631-34); and

(b) impairment of performance and participation in the classroom (e.g., Tr. 5880-84, 5887) (VI 2596-98, 2601).

(317) The medical and health problems of city children can be prevented or remedied in many cases if school nurse-teachers, health assistants or other trained health personnel are available in the schools to do health education, screening for health problems, notifying and counselling parents, and arranging for appropriate treatment (e.g., Tr. 5967-6003, 10454-56, 17522) (VI 2626-49; VII 3843-45; XI 5612-13).

(318) School-based health services are more costly for the cities because they require additional personnel to perform such tasks as repeated notifications and lengthy counselling of poor parents about their children's health problems, making arrangements and accompanying children to health facilities for treatment because poor parents are often unable to do so, and arranging Medicaid or reduced fees for eligible poor children (e.g., Tr. 5970-6003) (VI 2628-49).

(319) The cities, with their reduced State aid, cannot afford to provide such health services for their school children.

(320) New York City has only nine school nurses all funded by Follow Through; in most schools a Department of Health nurse visits once a month (Tr. 5967, 6020-21) (VI 2627, 2652-53).

(321) In some instances, Buffalo can provide a nurse only one day a week for a school with a thousand pupils (Tr. 10454-55) (VIII 3843-44).

(322) Syracuse has had to eliminate its nurse-teachers because of budget shortages (Tr. 9983) (VIII 3705).

5. Handicapped Children

(323) The city school districts have a substantial overburden of handicapped students.

(324) Although they [have] *had* only 35.8% of the State's total public school enrollment *in 1974-75*, the intervenor school districts [have] *had* 55.1% of the severely handicapped children (Ex. 164A) (the trainable mentally retarded, deaf, severely crippled, severely emotionally disturbed and multiple handicapped, who [receive] *received* special services aid from the State, Tr. 9200, 9203, 9223), and 52.7% of children with handicapping conditions (nonseverely handicapped children who [are] *were* double weighted for purposes of State aid, Tr. 9203) (Ex. CQ1, p.147). *Although they had only 36% of the State's public school enrollment, the intervenor school districts had the following percentages of the State's handicapped pupils in 1979-1980: 56% of the State's pupils who have been found to require special programs 60% or more of each school day, 29% of those who have been found to require special programs 20% or more of each school week and 13% of those who have been found to require special programs two or more periods a week (derived from SED 1980-81 SA 124 Rept., Ed No. 239, 3/4/81; Public School Enrollment and Staff, New York State (1979-1980). Although they have only 37% of the State's public school enrollment, the intervenor school districts had the following percentages of the State's handicapped pupils in 1980-1981: 57% of the State's pupils who have been*

found to require special programs 60% or more of each school day, 32% of those who have been found to require special programs 20% or more of each school week and 24% of those who have been found to require special programs two or more periods a week (SED data 9/21/81; SED Public School Enrollment and Staff, New York State 1980-1981).

(325) The percentage of handicapped pupils in each of the city school districts also far exceeds its share of total student enrollment in its metropolitan area (Ex. 164B-C, e.g., Tr. 10450-51) (VII 3580-81; VIII 3840-41).

(326) Marked increases [d] have occurred in the cities' handicapped special education population in recent years (Tr. 9123) (VII 3500).

(327) In the last decade the number of students in special education programs in New York City, for example, increased from 24,101 to 40,471 (Tr. 11439-40, Ex. 198) (IX 4150-51, 4296).

(328) The City must also educate many more children with severe and multiple handicaps (Tr. 9123-24, 11551) (VII 3500-01, IX 4212).

(329) The increase in poverty students in the cities has been paralleled by an increase in the number of handicapped pupils (Ex. 163A-E, 198) (VII 3574-78; IX 4296).

(330) Expert witnesses attributed the high numbers and increases of handicapped children in the cities to:

(a) medical and educational trends that permit the survival of more children with birth defects and encourage the deinstitutionalization of handicapped children (Tr. 6564-65, 9124-26) (VI 2824; VII 3500-02);

(b) the prevalence of lead-poisoning, malnutrition, birth defects caused by drug addiction, lack of pre-natal care and other poverty-related conditions that give rise to handicaps (Tr. 7556-59, 9187-88) (VII 3090-93, 3525-26); and

(c) the frequent exacerbation of existing handicaps by lack of regular medical attention, nutritional deficiencies and other circumstances associated with urban poverty (Tr. 7557, 7560-63, 9186-88) (VII 3091, 3093-96, 3525-26).

IFF 331 deleted by Trial Judge.

(332) Speech and language handicaps affect many thousands of city school children, including 17,000 in New York City with impairments considered severely handicapping by professional diagnosticians (Tr. 9232-34, 9507-08) (VII 3529-31; VII 3559-60).

(333) The incidence of speech disabilities is positively correlated with factors associated with poverty such as birth defects and poor medical care (Tr. 7564, 9523-24, 9532-33, 19171) (VII 3096, 3561-62, 3562-64; XII 5889).

(334) Other handicaps such as deafness and severe emotional disturbance, which are disproportionately frequent in the cities (see Findings 324-25), are frequently accompanied by speech and language handicaps (Tr. 7568-69, 19240) (VII 3099-3100; XII 5897).

(335) Learning disabilities *are* caused by minimal brain dysfunctions and manifested in an inability to receive, organize or express information normally (Tr. 9155-57, 9558-60) (VII 3518-20).

(336) They cause learning problems (e.g., Tr. 7282-85) (VII 3020-23), (e.g., Tr. 7270-74) (VII 3011-15), as well as derivative emotional disturbances which may outlive the original disability (Tr. 7254, 7304-7305) (VII 3000-01, 3207-08).

(337) Learning disabilities impede the academic achievement of an estimated 10% to 30% of New York City school children (Tr. 9557) (VII 3556).

(338) Under State and federal law the cities must provide a variety of special professional services in order to identify and educate handicapped children (e.g., Education Law § 4402[*],

* [Citation changed to reflect current numbering.]

8 N.Y.C.R.R. 200.12[*]; *Matter of Riley Reid,* 13 Ed. Dept. Rep. 117 (1973); Education of Handicapped 20 U.S.C. §§ 14102-20).

(339) A child identified as potentially handicapped is referred to a school guidance counsellor or social worker, who must arrange physical, neurological and psychological examinations (8 N.Y.C.R.R. 200.3[*]; Tr. 6391-93, 7657-58, 9131) (VI 2791-92; VII 3163-64, 3504-05).

(340) A committee on the handicapped then reviews the child's record and recommends special education placement or other treatment, after notification of the parent and a formal hearing, if one is requested (8 N.Y.C.R.R. 200.5[*], Tr. 6970-74, 9083-86, 9457-69, 9484-88) (VI 2955-58; VII 3115-17, 3543-52, 52-53).

(341) A child identified as handicapped through these procedures must under State law be given special education services, including special classes, typically of 10 children with a special teacher (Education Law § 4402[*]; 8 N.Y.C.R.R. 200.4[*]).

(342) Classes even smaller than this legal limit are needed for certain handicapped children who are difficult to manage or who need close individual supervision or therapy such as many junior high *school* age brain-injured children (Tr. 9147-49, 9240-41) (VII 3513-15, 3534, 3535).

(343) After placement, school psychologists, social and family workers must work with the teacher and family of a handicapped child (Tr. 9127) (VII 3502).

(344) By State Law, the status of a child identified as handicapped must be reviewed annually and re-evaluated once every three years (Education Law 4402[*], Tr. 9150) (VII 3516).

(345) Children with disabilities not sufficiently severe to require placement in special classes must receive itinerant therapy from specially-trained personnel.

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* [Citation changed to reflect current numbering.]

(346) Children with non-severe speech impairments, for example, need therapy several times a week from a professional speech therapist (Tr. 19088-93) (XII 5877-80).

(347) Children with learning disaiblities need professionally administered therapy or prescriptive teaching techniques applied on an individual basis; these techniques often require special equipment or materials (Tr. 7255, 7258, 7263-69, 7299-303) (VII 3001, 3003, 3007-11, 3024-27).

(348) Training to sensitize teachers to the existence and symptoms of learning disabilities is also essential to dealing with them successfully (Tr. 7312, [7309-14, 7340-42] *7332-33*) (VII 3031, VII 3036).

(349) Education of handicapped children and prevention or remediation of certain handicapping conditions may also be carried out through approaches outside the standard special education framework, as illustrated by successful programs described at trial such as the Educational Diagnostic and Prescriptive Teaching Center in Community School District 8 in New York City (Tr. 6726-39) (VI 2890-99), Rochester's Summer Educational Recreation Program for children with serious emotional problems (Tr. 6936-41) (VI 2941-45), Syracuse's vocational work-study program for the educable mentally retarded (Tr. 8013-24, 8033-39) (VII 3243-44, 3252-56) and school-based learning disability projects (Tr. 7270-85) (VII 3011, 3012-23). (See also Tr. 6945-47, 6948-52) (VI 2947-49, 2950-53).

(350) The testing and evaluation of handicapped children and provision of instruction and therapy for their disabilities is expensive.

(351) The State-mandated procedures for diagnosis, placement and education of handicapped children require a heavy investment of staff time for:

(a) initial testing and preparation of records on children identified as potentially handicapped (Tr. 5984-90, 6375-78, 6389-90) (VI 2637-40, 2780-82, 2789-90);

(b) serving on the committees tht evaluate potentially handicapped children, recommend placement, and monitor their status (Tr. 9150-51) (VII 3516);

(c) teaching small special education classes or giving small group or individual therapy (8 N.Y.C.R.R. 200.4[*], e.g., Tr. 9147-49, 7299-303, 9128-29) (VII 3513-15, 3024-27, 3503); and

(d) providing support and assistance to teachers and families of handicapped children (e.g., Tr. 9127-29, 9145-48) (VII 3503-04, 3512-14).

(352) The effective special programs described at trial required funds beyond those allocated for the regular educational program (e.g., Tr. 6946, 6950-52) (VI 2948, 2951-52).

(353) For example, Rochester's six-week summer program for emotionally troubled children cost $500 per student (Tr. 6941) (VI 2945), and the Educational Diagnostic and Prescriptive Teaching Center cost over $1,000 per child annually (see Tr. 6730, 6827) (VI 2892, 2923b).

(354) The cities, with their reduced State aid, cannot afford to provide the services necessary to test, evaluate, treat and instruct all of their handicapped children.

(355) State aid for the handicapped is inadequate to compensate for the cities' overload of handicapped children.

(356) It is reduced because the formula allocating it is unfavorable to city districts (Findings 215, 223, 235).

(357) *In 1975-76* State aid also [takes] *took* insufficient account of the severity of certain handicaps such as:

(a) brain injury and certain emotional disturbances regarded by professional diagnosticians as severely handicapping but aided with only the double weighting as non-severe (Tr. 9229-30, 9240-43, 9443);

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* [Citation changed to reflect current numbering.]

(b) severe speech impairments that [are] *were* totally unaided because the city districts [cannot] *could not* afford to provide therapy at the five-day-a-week level sufficient to entitle them to handicapping aid (Tr. 7565-78, 9231-35), or because they [are] *were* secondary to other handicaps and speech handicaps [are] *were* not counted under the State Regulation in determining whether a child is multiply handicapped (8 N.Y.C.R.R. 200.2(a)(4); Tr. 7569-72, 7580-82, 19221-24). [and]

(358) Funding shortages have recently forced the cities to make severe cuts in their special education and mental health staffs (e.g., Tr. 9145-47, 9982-83, 9987, 10497, 11546; Findings 298-99). *See IFF (362-A) below.*

(359) New York City, for example, lost 1,050 special education teachers and scores of social workers and psychologists *in 1975-76* [last year] while gaining special education pupils (Ex. 162, Tr. 9141-45) (VII 3573, 3509-12) (*Tr. 9144*) (VII 3511).

(360) The special programs cited in Finding 349, as well as others have been cut back or eliminated altogether (Tr. 6731, 6942-44, 6947, 6950-52). *See IFF (362-A) below.*

(361) A New York City proposal for handling learning disabilities in the schools, similar to programs in effect in many suburban districts, cannot be implemented for lack of funds (Tr. 9157-58). *See IFF (362-A) below.*

(362-A) The judgments in Jose P. v. Ambach, 79 Civ. 270; UCP v. Board of Education, 79 Civ. 560; Dyrcia S. v. Board of Education, 79 Civ. 2562 (U.S. Dist. Ct. EDNY, NICKERSON, J., Dec. 1979; see also memorandum and order, May 16, 1979) required the New York City Board of Education, inter alia, to evaluate and place promptly all children suspected of having handicapping conditions. Between 1978 and 1980 the number of identified handicapped pupils served by the Board of Education increased from 54,355 to 81,756 (SED From PHC-1 Part A "Report of Numbers of Handicapped Served," fall 1978, fall 1980).

(362-B) Handicapped aid is now provided on the basis of the child's placement in a program, not by the type of handicap. Four previous formulae for aiding handicapped children, including those in BOCES, have been eliminated. Handicapped children are weighted an extra 1.7 if they have been found by a committee on the handicapped to require: (1) placement for at least 60% of the school day in a special class, or (2) home or hospital instruction for more than 60 days or (3) special services or programs for more than 60% of the school day. They receive an extra 0.9 weighting if they have been found to require: (1) placement for 20% or more of the school week in a resource room, or (2) special services or programs 20% or more of the school week. Students are weighted an extra 0.13 if they have been found to require two or more periods a week of special instruction either in speech or in other special programs or services.

(a) Beginning in the 1981-82 school year, these weightings will be used in the wealth measure. Under the current formula (L 1980, ch 53, § 13; L 1981, ch 53, § 32, Education Law, § 3602, subds 9, 19), aid for handicapped pupils is distributed under an aid ratio formula similar to Tier I in the basic operating aid formula. The aid ratio is the same as that used for Tier I operating aid, except that a minimum aid ratio of .25 is guaranteed.

(b) State payments under the excess cost aid formula are provided for children who are found to be handicapped by a district committee on the handicapped and who are placed in an approved program. The formula applies the aid ratio and handicapped weights to each district's aidable expense per handicapped child between a minimum of $1,650 and a maximum of $2,300 in 1981-1982. Aidable expense per handicapped child is calculated by dividing a district's approved operating expense for all children in the school year immediately preceding the current year by its TAPU (total aidable pupil units) plus weighted handicapped children in both public and private school programs. The aidable expenses and handicapped weightings were based on a statewide survey which

resulted in a State average cost of educating all handicapped pupils in primary and secondary programs. The excess cost aid is in addition to the inclusion of handicapped students as TWPU in the wealth measure for operating aid (Education Law, § 3602, subd 1, par d, subd 2-b, subd 9, par b).

(c) Separate excess cost aid is provided for handicapped children in exceptionally expensive programs. Districts having children for whom the cost, as approved by the Commissioner of Education, for appropriate special services or programs, exceeds the lesser of $10,000 or four times the expense per handicapped child without limits in the school year immediately preceding are entitled to an additional apportionment for each such child. For each child, aid is determined by multiplying the district's excess cost aid ratio times the amount by which the actual cost exceeds three times the district's expense per handicapped child without limits in the school year immediately preceding.

(d) Educable mentally retarded students educated in BOCES schools were not included in the pupil counts for operating aid until 1981-1982 (L 1980, ch 53, § 30).

(e) Categorical aid for diagnosing educational needs of each child from kindergarten through sixth grade is provided at $8 per pupil (L 1981, ch 53, § 34; Education Law, § 3602, subd 21).

(f) Under current law pupils with handicapping conditions are defined as "pupils who are trainable mentally retarded, educable mentally retarded, visually impaired, hearing impaired, physically handicapped, speech impaired, emotionally disturbed, autistic, or learning disabled, as such terms are defined by the commissioner and who receive special educational services or attend programs which meet criteria established by the commissioner" (L 1981, ch 53, § 32; Education Law, § 3602, subd 19, par a).

(g) In 1979-1980, the Legislature provided a total of $200.8 million in handicapped aid, of which $4.1 million went to

Buffalo, $4.5 million to Rochester, $95.0 million to New York City, and $2.4 million to Syracuse. $18.6 million of the State-wide total was for educable mentally retarded pupils educated in BOCES schools and reflects both operating and handicapped aid.

(h) In 1980-1981, the Legislature provided excess cost aid for handicapped students in public schools as follows: State-wide total, $218.6 million; Buffalo, $6.3 million; Rochester, $4.1 million; New York City, $85.4 million; Syracuse, $2.7 million; this represented $875 per weighted resident handicapped pupil unit in New York City, $1205 in Buffalo, $1021 in Rochester, $1100 in Syracuse, and an average of $1130 in the rest of the State. The additional aid in 1980-1981 for students with handicapping conditions who require special programs 60% or more of each school day is $1,488 in New York City, $2,049 in Buffalo, $1,735 in Rochester, $1,870 in Syracuse, and an average of $1,921 in the rest of the State. The additional per pupil handicapped aid figures for those requiring special programs 20% or more of each week are $788 in New York City, $1,085 in Buffalo $918 in Rochester, $990 in Syracuse, and an average of $1,017 in the rest of the State. The additional per pupil aid figures for those requiring special programs two or more periods a week are $114 in New York City, $157 in Buffalo, $133 in Rochester, $143 in Syracuse, and an average of $147 in the rest of the State.

(i) In 1981-1982, the Legislature will provide an estimated total of excess cost aid for handicapped school students in public schools as follows: State-wide total, $259.4 million; Buffalo, $6.9 million; Rochester, $4.6 million; New York City, $105.8 million; Syracuse, $3.1 million; this represents $958 per weighted resident handicapped pupil unit in New York City, $1,301 in Buffalo, $1,102 in Rochester, $1,228 in Syracuse, and an average of $1,207 for the rest of the State. The additional aid in 1981-82 for students with handicapping conditions who require special programs 60% or more of each school day will be $1,628 in New York City, $2,212 in Buffalo, $1,873 in Rochester, $2,088 in Syracuse, and an average of $1,921 in the

rest of the State. The additional per pupil handicapped aid figures for those requiring special programs 20% or more of each week will be $862 in New York City, $1,171 in Buffalo, $992 in Rochester, $1,105 in Syracuse, and an average of $1,017 in the rest of the State. The additional per pupil aid figures for those requiring special programs two or more periods a week will be $125 in New York City, $169 in Buffalo, $143 in Rochester, $160 in Syracuse, and an average of $147 in the rest of the State (derived from SED data 9/21/81; SED 1981-82 State Aid Projections, SA091-2, DB Ed 3151, 9/16/81).

6. Foreign Language Children

(363) The city school districts have a substantial overburden of pupils who speak and read little or no English.

(364) Tests administered to foreign language speaking students in 1975 and 1976 show that 100,000 to 110,000 New York City students are unable to participate in school effectively in English (Tr. 8590-92, Ex. 13A, p. 31) (VII 3342-44).

(365) The upstate cities have a percentage of [Asian and] Spanish surnamed pupils far in excess of their share of total public school enrollment (see Ex. 147 Tables 1, 3) (V 2399, 2401).

(366) The cities' students without facility in English speak a wide variety of foreign languages, including Spanish, Chinese, Italian, Greek, French, Vietnamese and Russian (Ex. 157, Tr. 8589, 8593) (VII 3373, 3341-44, 3342, 3344).

(367) The composition of their foreign language population shifts frequently; heavy influxes of Puerto Ricans, for example, have been succeeded by other Latin Americans, Greeks, Vietnamese and Russians (Tr. 8593-94, 10208-09) (VII 3344-45; VIII 3787-88).

(368) Some of the cities' immigrant pupils are totally illiterate in their own tongues (Tr. 7432-35, 7484-95) (VII 3053-55, 3077-84).

(369) HEW regulations require that public school authorities must make their instructional programs meaningfully available to students unable to understand English (Ex. 160, Lau v. Nichols, 414 U.S. 563) (VII 3382).

(370) Pursuant to a court decree in Aspira of New York, Inc. v. Board of Education of City of New York, 72 Civ. 40002 (S.D.N.Y., Aug. 29, 1974) (*see 423 F Supp 647*) (Ex. 158) the New York City Board of Education must:

(a) "identify those students whose English language deficiencies prevent them from effectively participating in the learning process and who can more effectively participate in Spanish" (p.2);

(b) provide them a program designed to teach them English, instruct them in substantive courses in Spanish, and reinforce and develop their use of Spanish (p. 4);

(c) distribute (developing if necessary) appropriate instructional materials and tests (p. 6); and

(d) recruit, prepare and license bilingual school personnel (pp. 6-7).

(371) Instruction of non-speakers of English takes the form of (a) English as a second Language (ESL) instruction, which students receive while participating in an otherwise ordinary English-language curriculum (Tr. 8600-04) (VII 3345-49); or (b) bilingual education, in which the students receive subject area instruction in their native language in addition to ESL instruction (Tr. 8601-03, 8610) (VII 3345-48, 3352).

(372) When implemented with sufficient time and individualization to permit substantial practice in English, ESL, bilingual education, and a special variant of ESL known as Situational Reinforcement Language Training have proved effective, as attested by administrators who have worked with foreign language children (e.g., Tr. 7458-59, 7463-65, 7497-500, 8641-44) (VII 3069-70, 3072-74, 3085-88, 3363-66).

(373) Institution of ESL and bilingual education programs in number and depth sufficient to develop English language facility in foreign language pupils requires expenditures considerably beyond those needed for the ordinary English language program.

(374) Implementation of the Aspira decree has entailed special expenditures for setting up pilot schools, recruiting and licensing bilingual staff, training existing personnel in Spanish, and developing and disseminating materials and curricula for all grades in several languages (Tr. 8609-13, 8627-28, 8648-49) (VII 3351-54, 3360-61, 3366-67).

(375) Bilingual personnel and materials must also be provided for programs such as special education (Tr. 9445-46) (VII 3538), occupational education (Tr. 12301-04) (IX 4364-66), and pre-kindergarten (e.g., Tr. 5294-95) (VI 2409-10), and in supportive divisions, e.g., guidance counsellors and social workers (Tr. 7261, 7649-52, 7677A-78, 8624-25) (VII 3005, 3157-60, 3171-72, 3357-59).

(376) The individualization and small group instruction needed to develop English facility require small pupil-staff ratios (Tr. 8600-04, e.g., 7458-59, 7463-65) (VII 3345-49, 3068-70, 3070-74).

(377) The cities, with their reduced State aid, cannot afford to develop adequately the English language facility of their great concentrations of pupils who speak and read little or no English.

(378) Pupils who have been in the United States less than two years, whose English is inadequate for effective participation in the normal English curriculum, are displaced from ESL classes by new arrivals from overseas (Tr. 7453-62) (VII 3065-72).

(379) Bilingual and ESL funding [has been] *were* reduced in New York City *in 1975-1976* (Ex. 161, Tr. 8609-10, 8620-22) (VII 3385, 3351-52, 3355-57). *In the case of ESL funding, there was a reduction in Federal funding and the city district could*

not absorb the cost with city tax levy funds (Tr. 8605-08) (VII 3349-51). In the case of bilingual funding, total funding was reduced due to the reduction in city tax levy funding notwithstanding an increase in both Federal and State funding (Tr. 8609-10) (VII 3351-52; Ex. 161, VII 3385).

(380) In consequence:

(a) bilingual and ESL instructional time has been substantially diminished (Tr. 8603-08) (VII 3349-51), and class sizes increased (Tr. 8604, 8623-24) (VII 3349, 3357-59);

(b) continuity of instruction has been impaired for foreign language children by teacher transfer caused by recent personnel excessing in New York City (Tr. 8628-30) (VII 3361-62), and by displacement from ESL or bilingual classes by newly arrived immigrant pupils (Tr. 7453-62, 8630-31) (VII 3066-72, 3362);

(c) students with special problems such as learning disabilities cannot be helped because bilingual support personnel are unavailable (e.g., 7279-81) (VII 3018-20), and

(d) many foreign language students remain without facility in English and do poorly in school performance (e.g., Tr. 7453-62, 7470-72) (VII 3065-72, 3075-76).

7. Occupational Education Students

(381) The *upstate* city school districts have a substantial overburden of occupational education students (Ex. 187) (VIII 4134).

(382) The percentage of high school occupational enrollment in the three upstate cities is two or three times that of their suburbs; Rochester, for example, has 27% of its grades 9-12 students in occupational programs, compared to 8% in the rest of Monroe County (Ex. 187) (VIII 4134).

(383) New York City has almost 30,000 students in occupational programs and a higher proportion than [any] *some* of its surrounding counties (Ex. 187) (VIII 4134).

(384) The city districts have a greater need for occupational education programs because more city students go into trades and fewer go on to higher education (Tr. 11527-28, 12283-84) (IX 4204, 4358), and because occupational education is highly effective in motivating students to attend school and to achieve learning (Tr. 8018-19, 10439-41, 10457-59, 12283-84, 16410-11) (VII 3247-48, VIII 3834-35; IX 4358; IX 5459-60).

(385) Higher concentrations of occupational students constitute an overburden for the city districts because occupational education costs far more per pupil than academic education (Tr. 12293-94, 12301) (IX 4360-61, 4364).

(386) In Buffalo, for example, occupational education costs $724 per pupil more than academic education, even after State occupational aid reimbursement (Tr. 10437-38) (VIII 3833).

(387) Reasons for the added cost include high capital outlay on, for example, expensive equipment (Tr. 8996, 12295) (VII 3482; IX 4361-62; IX 4362); maintenance (Tr. 12295-96); frequent replacement of equipment necessitated by changing technology (Tr. 12298, 12360-64) (IX 4363, 4369-72); more highly skilled teachers (Tr. 12295) (IX 4361); and smaller class size required by limited equipment and the need for closer supervision when students work with dangerous tools or materials (Tr. 8996, 12300-01, 22657-58) (VII 3481-82; IX 4363-64; XII 6256).

(388) The cities, with their reduced State aid, cannot afford to provide occupational education to all of their students who want and need it (e.g., Tr. 12289-90) (IX 4359-60).

(389) New York City, for example, rejects 15,000 students annually—half the applicants—while its occupational schools are substantially over-utilized (Tr. 8994-96, 8999) (VII 3481-82, 3483).

(390) Students are also turned away from occupational programs in the upstate cities (e.g., Tr. 8038-39, 10440) (VII 3255-56; VIII 3834-35).

(391) Obsolete tools and lack of newly developed equipment in entire fields such as computer repair impair the scope and content of city occupational offerings (Tr. 11527-28, 12309) (IX 4204-05, 4366).

8. Student Absenteeism

(392) The city school districts have a substantial overburden from their exceptionally high rates of student absenteeism.

(393) Daily attendance in the State's largest cities is considerably below that in the rest of the State (Findings 184-85).

(394) Heavy absenteeism in the cities stems primarily from poverty (Findings 191-99).

(395) Effects of the cities' high rates of absenteeism include:

(a) the necessity for maintaining proportionately large staffs of attendance officers, with concomitant higher costs (see Ex. 183B) (VIII 4115);

(b) the burden on teachers to do additional record-keeping, to give remedial assistance to returning absentees while continuing to advance the knowledge of others in the class (Tr. 7838, 8153-54, 9000-02, 9992, 11466-67, 16389-90) (VII 3189, 3265, 3484-85; VIII 3711; IX 4163-64; XI 5453), and to revise instructional plans continuously because of the irregularity of most absences (Tr. 7837-39, 8345, 9000-02, 22637) (VII 3189, 3310, 3484-85; XII 6252), and;

(c) low achievement and failure of students who attend irregularly (Tr. 5566, 7838-39, 9991, 11968) (VI 2493; VII 3189-90; VIII 3710; VII 3498), and the eventual dropping out of many (Tr. 8138, 8192-93, see 8993-94, 10438-39) (VII 3281-82, 3480-81; VIII 3833-34).

(396) Attendance rates in the urban schools can be somewhat improved but only through very costly efforts.

(397) Attendance may improve where:

(a) students are motivated to attend by programs that meet their interests and needs, such as vocational education (Tr. 10439-40, 10458, 11064-65, 16409-11) (VIII 3833-34, 3846, 4038-39; IX 5458-60), bilingual education (Tr. 8619-20) (VIII 3354-55), and varied rich curricula (Tr. 8190, 9621-22, 17552-53) (VII 3279, VIII 3634-35; XI 5626); and

(b) support services are available at a level sufficient to cope with the underlying causes of absenteeism (e.g., Tr. 8243-46, 10320-21, 17554-58) (VII 3285-88; VIII 3803; XI 5627-30).

(398) City programs effective in improving attendance provided comprehensive enriched school offerings, for example, College Bound (Tr. 8741-43, 8747-48, 8777-79, 8792-803) (VII 3396-98, 3399, 3400, 3408-09, 3412-20), Project Impact (Tr. 7601-12) (VII 3126-34), and the O'Henry Intermediate School curriculum (Tr. 7895-952) (VII 3195-3235).

(399) Alternative schools and programs have also improved the attendance of chronic absentees (e.g., Tr. 8943-45, 11630-37) (VII 3445-47; IX 4236).

(400) The efforts enumerated in Findings 397-99 are very costly.

(401) Vocational, bilingual and enriched curricula cost more per pupil than the ordinary current curriculum (e.g., Findings 279-80, 374-76, 385-87).

(402) Support services sufficient to cope with the underlying causes of absenteeism require substantial numbers of personnel, which are expensive (Finding 294).

(403) Programs like College Bound and Project Impact require extra expenditures substantially beyond ordinary per pupil costs (Finding 280).

(404) Alternative education typically provides students with low pupil-staff ratios and strong counselling services, which also mean extra costs (e.g., Tr. 8943-45, 11630-37) (VII 3445-47; IX 4236).

(405) Alternative schools in New York City, for example, cost 20%-30% more than regular high schools for personnel alone and 10%-40% more for overhead (Tr. 11630-37) (IX 4236-41, 4240).

(406) The cities, with their reduced State aid, cannot afford to provide the programs and services necessary to ameliorate their high levels of student absenteeism.

(407) Ratios of pupils to attendance officers in the cities are extremely high; for example, in New York City the ratio citywide is one to 4,161 (Tr. 9135-37) (VII 3506) and in Buffalo it is one to 5,176 (Tr. 10497) (VIII 3852).

(408) The city school districts are unable to provide adequate support services (Findings 297-99), compensatory programs (Findings 433-38), alternative programs (e.g., Tr. 11630-37, 8141-42) (IX 4236-41; VII 3261), occupational education (Findings 388-91), enriched curricula (Findings 440, 442), or small classes (Findings 440-41).

C. (409) Thousands of Students in the Big City School Districts Fail to Achieve Even Basic Minimal Skills and Many More Are Chronic Under-achievers Who Consistently Score at the Bottom of State and National Tests.

(410) City scores on national achievement tests show that substantial numbers of urban students do not acquire even basic minimal educational skills. *Standardized tests given in Rochester in 1975 revealed that 45% of the secondary school students were "educationally disadvantaged"—that is, not performing at grade level and at least two years or more below level in reading—as were 58% of those students in mathematics (VIII 3627).*

(411) In 1976 in the Gates-MacGinitie Reading Test administered in Rochester, 16% of twelfth graders read at fifth grade level or below (Tr. 9611) (VIII 3628-29).

(412) In each of the last three years on the Metropolitan Achievement Test, many thousands of ninth grade students in

New York City scored at fourth grade level or below in reading, including 14% of those tested in 1974, 9% in 1975, and 12% in 1976 (Ex. 199A-C, Tr. 11443-48) (IX 4297-99; XI 4153-56).

(413) In the 1976 tests 7% of New York City's ninth graders scored at third grade level or below, and 4% at second grade level or below (see Ex. 208) (IX 4352-53).

(414) These levels underestimate the degree of reading incompetence of the city children, because the level at which a child can read without instructional assistance is a year below his grade equivalent score (Tr. 12201-03, 12210-11) (IX 4347-49, 4950).

(415) This education failure is not redressable in high school because the resources are not available there and because many of these failing students—half New York City's entering ninth graders, for example,—become dropouts (Tr. 8993, 11449-51, see Ex. 200) (VII 3295-98, 3301-06).

(416) Some of the remedial reading students in one New York City high school described at trial are totally illiterate; others can only decode words without understanding them, cannot place events given in a written passage in their proper order, use graphs, maps or indexes, or apply information they know to a problem (Tr. 8300-05, 8314-22) (VII 3295-98, 3301-06).

(417) Even greater numbers of city students remain seriously restricted in learning, falling below the State's own measures of minimum educational competency.

(418) According to the State's Pupil Evaluation Program (PEP) tests, which measure Statewide the reading and mathematics proficiency of third, sixth and ninth graders, the four intervening city districts with 35.8% of the State's public school enrollment have 52.4% of the "pupils with special educational needs" (PSEN), those scoring below minimum competency (Ex. CQ1, PP. 144, 147, Ex. 164A) (X 5087, 5135, 38; VII 3579).

(419) In both reading and mathematics in all grades the four cities have far larger percentages of students in the bottom three stanines of the 1973 PEP tests, and the average percentage of PSEN pupils in the four cities ranged from 25 to 35 percentage points greater than in the rest of the State (Ex. 179A) (VIII 4084).

(420) The percentage in the bottom three stanines is greater and the gap between the cities and the rest of the State widens as the children move to higher grades (see Ex. 179A, 179B, 179K, 179L) (VIII 4084, 85, 94, 95).

(421) Suburban districts consistently had the smallest percentage of students in the bottom three stanines, followed by rural districts, then minor cities, larger cities, and New York City; PSEN percentages in the suburban, rural and small city districts were low and in the large cities far higher (Ex. 179B) (VIII 4085).

(422) Among the PSEN students, far higher proportions of city students are in the bottom two stanines (Ex. 179E-J) (VIII 4088-93).

(423) More recent PEP scores reported at trial show the same concentrations of city students in the bottom three stanines (Tr. 8946-54, 9608-09, 9944-45, 10423-24) (VII 3447-54; VIII 3626-27, 3693-94, 3821-23).

(424) City scores on nationally normed tests confirm the PEP test results, with heavy concentrations of city students scoring at the bottom and few at the top (e.g., Ex. 180A-C, 199A-C, 207-210) (VIII 4096-98; IX 4297-99, 4351-57).

(425) Inner city test results were even more depressed; at Charles Evans Hughes High School in New York City, for example, 70% of the ninth graders tested were two or more years below grade level and one-fourth were at fourth grade level or below (Tr. 8277-80) (VII 3293-94).

(426) Severe educational underachievement and failure is compounded as the student goes through school, because the

later curriculum is based on skills assumed to [be] *have been* acquired earlier (Finding 263).

(427) According to expert educational witnesses the offerings of the later curriculum are necessary to give a child the education needed in a modern industrial society (Tr. 4382, see Tr. 5632-46) (V 2186, 2347-57).

(428) The problems of educational failure and severe underachievement can be remedied or substantially ameliorated by implementation of efforts needed to overcome the educational overburdens described in section VI above.

(429) A more limited but somewhat effective approach is target remedial education that includes such elements as individualized instruction, special resource teachers, in-service training of classroom teachers, and guidance services, as attested by:

(a) expert witnesses and experienced school personnel (e.g., Tr. 8308-10, 8343-44, 8376-87, 8418-29, 8830, 8962-65, 9617, 10431) (VII 3299-311, 3308-10, 3310-18, 3318, 3326, 3433-34, 3459-62; VIII 3632, 3827); and

(b) successful efforts described at trial such as Buffalo's "year of reading" (Tr. 10423-30) (VIII 3823-27), reading and math priority programs in Syracuse and Rochester (Tr. 9940-45, 7017-24, 9614-16) (VIII 3691-94, VI 2964-69; VIII 3630-32), and the Right to Read and Multi-Sensory Reading programs in Community School District 8 in New York City (Tr. 6748-57) (VI 2904-11).

(430) Implementation of effective remedial programs costs far more money per student than the regular educational program.

(431) The elements enumerated in Finding 429 involve substantial numbers of additional personnel and are therefore expensive (see Finding 266).

(432) The effective programs enumerated in Finding 429 required funds beyond those allocated for regular educational

programs (Tr. 6750-51, 6753-54, 9943) (VI 2905-06, 2907-09; VIII 3693); for example, Community School Ditrict 8's Right to Read program cost over $1000 per child annually (see Tr. 6750-51) (VI 2905-06).

(433) The cities, with their reduced State aid, cannot afford to provide effective remedial education to all their students who are underachieving and failing in school.

(434) Existing programs in the cities now fail to remedy underachievement and failure, as evidenced by Findings 410-14, 417-25.

(435) The number of students eligible for Title I remedial services greatly exceeds the number that receive them (Tr. 10505-11, 11463) (VIII 3858-63; IX 4163).

(436) Many students in the cities' higher grades receive no remedial services at all (Tr. 8980-84, 9613-16, 10435-36) (VII 3472-75; VIII 3630-02, 3831-32).

(437) The effective programs enumerated in Finding 429 have been cut back or eliminated altogether (Tr. 6757-60, 7024, 9614-15, 10505-11) (VI 2910-13, 2968-69; VIII 3630-31, 3858-63).

(438) Summer and evening schools, which facilitated catching up by failing students, have been almost eliminated in the cities (Tr. 9001-12, 9634-35, 10498-500, 11545-47) (VII 3485-93; VIII 3636-37, 3853-55; IX 4208).

D. Miscellaneous

(439) A further result of the State aid statute's aid scale, which yields the cities reduced aid per pupil and reduced supplemental aid per special needs pupil in disregard of their major educational overburdens, is that *all students* in the city public schools are shortchanged (*emphasis added*).

(440) As the cities concentrate resources on special need students, other students, including disadvantaged pupils not reached by special programs, suffer diminished educational

offerings and opportunity (e.g., Tr. 9012-15, 10228-30, 10512-13) (VII 3493-95; VIII 3791-93, 3864-65).

(441) City students have among the highest teacher-classroom ratios in the State (Ex. 215, Tr. 7024, 8971, 10220-21, 11753, 13125-28, 17686-87, 22427-28) (IX 4317; VI 2969; VI 3466; VIII 3788-89; IX 4263, 4264-66; XI 5652-53; XII 6130-31).

(442) The variety of elective courses is severely constricted (Tr 9012-15, 9640, 10501-03) (VII 3492-95; VIII 3638, 3855-58).

(443) Many students attend school in decrepit buildings in need of basic repairs and without appropriate facilities for counselling, study or recreation (e.g., Tr. 6721-25, 7422-26, 10417-23) (VI 2886-89; VII 3048-50; VIII 3817-21).

(444) City students are also shortchanged in physical security (e.g., Tr. 9984) (VIII 3705), transportation (e.g., Tr. 10492-93) (VIII 3849), support services (Finding 299), sports and extra-curricular activities (e.g., Tr. 8976-77, 10500-01) (VII 3469-70; VIII 3855), libraries (e.g., Tr. 10503-04) (VIII 3857), supervision of their teachers (e.g., Tr. 7620-21) (VII 3139-40), health services (e.g., Tr. 10454-56, 11542) (VIII 3843-45; IX 4206-07), art and music (e.g., Tr. 9638-39) (VIII 3638).

(445) The cities have exceptionally high dropout rates (Ex. 204) (IX 4310).

(446) *Approximately* [T]*ten* percent of New York City's high school students drop out annually, compared to 3.4% in the rest of the State (Ex. 200, Tr. 11450) (IX 4300, IX 4157) and half the entering ninth graders fail to graduate four years later (Tr. 8993, 11450-51) (VII 3480; IX 4158) (see also Tr. 8322-25, 10438) (VIII 3806-08, 3833).

E. Local Control

447 Budgetary constraints resulting from the operation of the school financing scheme render local control over education illusory in the urban school districts.

448 The fiscal constraints imposed upon the urban school districts as a result of their reduced aid and municipal and educational overburdens afford them little leeway in developing a curriculum beyond that required as a State minimum.

449 In New York City high schools, many small classes in specialized areas such as music have been eliminated and others, such as elective courses in English and social studies, fourth year foreign language, advanced mathematics, advanced sciences and specialized science, have been curtailed (VII 3466).

450 Budget cuts have resulted in a 50% reduction in funds for athletic and nonathletic extra curricular activities (VII 3469-3470).

451 The city budget permits summer school to offer only remedial classes; no enrichment classes could be offered (VII 3485). The reduction in the number of evening high schools reduced their accessibility to many students, thereby discouraging attendance (VII 3492).

452 New York City was unable to satisfy the need for vocational education because of an excess demand for placement and lack of appropriate equipment (IX 4205).

a. No computer repair program to complement the electronics technician training program was offered because the program does not have access to modern equipment (IX 4205).

b. Pupils in the maritime trades program were being trained on an outdated diesel facility rather than on modern equipment (IX 4205).

453 To save money and in order to gain productivity improvements, the school week was shortened by a total of 90 minutes per week at the elementary and junior high school levels (IX 4206).

454 The impact of budget cuts on the evening high schools have been cuts in excess of 50%. The impact on summer schools has been an 80% cut (IX 4206).

455 Budget cuts have affected special programs and extra-curricular activities by necessitating:

(a) A reduction of funds in community school districts for the after-school program from $23 million in fiscal 1973-1974 to $7 million in fiscal 1975-1976 (IX 4206).

(b) A curtailment of the inter-scholastic sports program by 50% (IX 4206).

(c) A reduction in the school health program by almost 25% (IX 4206-07).

456 Budget cuts forced the reduction of the number of evening high schools from 16, serving 30,000 students in 1974-1975, to one full-time and two part-time evening schools servicing 10,000 students in 1975-1976 (IX 4208).

457 All tax levy support for the 20 evening trade high schools was eliminated for budgetary reasons (IX 4208).

458 After budget cutting, only 11,000 students can be served in summer schools—55,000 were served in the summer of 1974 (IX 4208).

459 In Rochester, various mandates, such as the Reilly Reid *decision, bilingual education, special education, and school lunch and breakfast programs, were met by making cuts in other areas of the school budget (IX 3791-92). (13 Ed Dept Rep 117.)*

460 Buffalo schools could not concentrate on bilingual education, remedial mathematics and remedial reading programs for grades four through eight due to lack of funds (VIII 3831).

461 All children who applied to Buffalo's vocational programs could not be accommodated because of fund shortages.

462 Because of lack of funds, kindergarten was unavailable for Buffalo school children (VIII 3848).

463 Budget restrictions resulted in elimination of the evening high school, summer school, interscholastic sports and all

extra-curricular activities (VIII 3853-3855). The seventh and eight grade science program was cut in half, as were the art, music, home economics and industrial arts programs (VIII 3856). Foreign language programs for seventh and eight grades are no longer offered (VIII 3858).

464 Fiscal constraints affect the urban school district's ability to engage necessary teaching and administrative personnel.

465 In New York City, curtailed budgets have resulted in termination of many teachers (VII 3475) which required substantial cuts in services (VII 3476).

466 Budget cuts have resulted in the loss of supportive therapy teachers for some 1,500 emotionally disturbed children (IX 4208).

467 5,000 neurologically impaired children lost the services of remedial instruction teachers as a result of cuts (IX 4208).

468 169 speech improvement teachers were terminated with the result that 30,000 children who had received speech therapy services no longer receive them (IX 4208).

469 In 1976-77, New York City had to consider the termination of 5,000 teachers and further reductions of services to children with mental, physical and neurological handicaps, curtailment of evening trade programs and summer school, and a shortened school week (IX 4209).

470 For the 1971-1972 school year a $1 million cut in the Rochester supportive services budget resulted in reduction of helping teachers, professional staff, teachers and clerical help (Tr. 10220; VIII 3788).

471 In 1972-1973, budget cuts resulted in reduction of central services, counselors, psychologists, social workers, and elementary and secondary school teachers (VIII 3788).

472 In Buffalo, lack of funds precluded hiring of counselors for the elementary grades (VIII 3836).

473 In Buffalo, 1,200-1,300 children diagnosed as having speech impediments could not be serviced due to cuts in speech services (VIII 3841).

474 A $6 million budget gap between the 1975-1976 and 1976-1977 budgets was closed by reducing guidance teachers from 84 to 42 (VIII 3850); social workers were cut from 13 to 6, for a ratio of one worker to 12,500 children (VIII 3851-52); attendance teachers were cut from 34 to 17; 20 speech teachers were cut, and 30 librarians were cut, thus eliminating the entire elementary school library system (VIII 3852, 3857-58).

475 Testimony at the trial confirmed no inconsistency between achieving greater financial and tax equalization and preserving local control (Tr. 10,954-956, 13,023-024, 15,345, 18,968, 18,969).

F. Effect of Intervening Legislation

476 The changes worked by the legislation adopted since 1974, including those enacted by the 1981 Legislature, have had no substantial effect in alleviating the conditions flowing from the educational finance structure.

GLOSSARY OF TERMS

Average Daily Attendance (ADA) means the average number of pupils present on each regular school day in a given period, an average determined by dividing the total number of attendance days of all pupils by the number of days school was in session. ADA for a group of classes or schools in session for varying numbers of days is obtained by adding together the ADA for each.

Weighted Average Daily Attendance (WADA) is determined by applying the following weightings to the average daily attendance: Half-day kindergarten, 0.5; full-day kindergarten and grades one through six, 1.00; grades seven through twelve, 1.25.

Resident Weighted Average Daily Attendance (RWADA) is calculated by subtracting from the district's WADA, the WADA of non-resident pupils attending public school in the district and adding the WADA of pupils resident in the district but attending public school in another district or state or attending on a full-time basis a school operated by a Board of Cooperative Educational Services or a county vocational education and extension board, or another public school.

Pupils with Special Educational Needs (PSEN). The proportion of PSEN in a district was identified, at time of trial, by use of math and reading achievement tests given in the sixth grade (Pupil Evaluation and Placement or "PEP" tests). The proportion of sixth grade students in the bottom three stanines on this combined test in 1971-2 and 1972-3 ("PEP percentage") was applied to the entire school population each year to determine the number of pupils aidable as educationally disadvantaged in that district. Later legislation specified that the "PEP percentage" would be based on tests given to both third and sixth grade pupils.

Pupils With Handicapping Conditions refers to pupils who are trainable mentally retarded, educable mentally retarded,

visually impaired, hearing impaired, physically handicapped, speech impaired, emotionally disturbed, autistic, or learning disabled, as such terms are defined by the commissioner and who receive special educational services or attend programs which meet criteria established by the commissioner, operated by a district or by a board of cooperative educational services. Such pupils receive additional pupil unit weightings according to the type and quantum of services required for aid purposes.

Secondary School Pupil Weighting refers to the additional .25 pupil weighting given to students in grades 7-12, excluding certain categories of handicapped students and those students for whom a district has received a Special Services apportionment. At the time of trial, PSEN students were not eligible for this additional weighting.

Total Aidable Pupil Units (TAPU) refers to average daily attendance adjusted for half-day, kindergarten and religious holidays, plus the additional weightings for secondary school students, PSEN, and summer school and evening session students. TAPU is the basis for determining the district's State operating aid.

Total Wealth Pupil Units (TWPU) is employed in the measure of the district's capacity to fund its educational operating costs. It differs from TAPU in its count of certain categories of students.

Total State Aid means the sum total of State aid paid pursuant to law, principally pursuant to the provisions of sections 3602 (the general statute governing apportionment of public moneys to school districts), 1950 (governing the establishment of boards of cooperative educational services) and 701 (governing text-book aid) of the Education Law.

Tax Levy means local revenues raised by tax for school purposes, including property and nonproperty tax revenues.

Tax Rate means the tax levy divided by the full valuation of real property, expressed as a rate per $1,000 of full valuation.

Full Valuation of Taxable Real Property means the total assessed valuation of property on the tax rolls within the district adjusted by the State equalization rate determined for such rolls.

Major Districts means districts having eight or more teachers.

Total Expenditures means expenditures for the total school program from the district's general and Federal program funds, plus capital fund and repair reserve expenditures approved as operating expense.

Approved Operating Expenditures (AOE) are the operating expenses for the day-to-day operation of the school. Not included are expenses for building construction, transportation of pupils, expenditures made to purchase services from a Board of Cooperative Educational Services or County Vocational Education and Extension Board, tuition payments to other districts, and expenses for programs which do not conform to law or regulation. Money received as Federal aid revenue, proceeds of borrowing, and State aid for special programs are first deducted from total annual expenditures when approved operating expenditures are computed.

Opinion of the Supreme Court, Nassau County, dated June 23, 1978

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, et al., Plaintiffs, and BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, et al., Plaintiffs-Intervenors, v EWALD B. NYQUIST, as Commissioner of Education, et al., Defendants.

Supreme Court, Nassau County, June 23, 1978

SUMMARY

The Supreme Court in Nassau County (L. KINGSLEY SMITH, J.) held that the State's method of financing public education, relying primarily on local real property taxes, coupled with the State aid to education formula (L 1974, chs 241, 718) intended to equalize the disparities in educational expenditures among the State's school districts and to satisfy the State's obligation to "provide for the maintenance and support of a system of common free schools" (NY Const, art XI, § 1) by granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance and distributing flat grants even to school districts having the greatest property wealth and also assuring no decreases in the amount of State aid by the blanket use of "save-harmless" provisions, denies equal protection of the law (NY Const, art I, § 11) in operational effect to both property-poor districts which, though imposing sharply higher tax rates, have not been able to attain the spending levels of wealthier districts, and to the large urban school districts which are classified as less deserving of State aid by reason of the use of the flawed measure of fiscal capacity which overstates the fiscal capacity of large city school districts to finance public education by failing to give adequate effect to such municipal overburdens as the drain on large city tax dollars caused by the need to provide an enormous amount of noneducational services; the diminished value of the dollar allocated to city school purposes; the increased school costs caused by the far higher rates of student absenteeism prevailing in the large city schools; and the increased costs caused by the far greater concentrations and numbers of disadvantaged, handicapped and other students with special needs. The express linkage of district property wealth and district spending in the State aid formula, which assumes a hypothetical spending norm of $1,200 per pupil and provides

State aid to districts to raise funds necessary to reach that spendng level provided the districts levy a 15 mill tax on their own tax bases, makes it highly probable that districts with greater property wealth will spend more per pupil than their poorer counterparts resulting in the inability of such poorer districts to match the ability of districts with greater real property wealth to offer educational advantages such as: small class size; experienced and effective teachers; low pupil-teacher ratios; curricular breadth; extensive extracurricular programs; modern equipment; and special programs for the disadvantaged or the specially gifted. In addition, the State aid statute, by providing reduced per pupil and reduced supplemental aid per special needs pupil to the large city school districts which have the largest numbers and concentrations of pupils seriously deficient in basic education skills, violates the education clause of the State Constitution (art XI, § 1) which imposes on the State the obligation to assure to each school child an educational program that is appropriate to that child's needs and guarantees to all children of the State an equal opportunity to acquire those basic minimal educational skills necessary to function as a citizen in a democratic society. In order to avoid disorder and confusion, the declaration of unconstitutionality shall be prospective only so as to afford the Legislature an opportunity to develop a suitable plan for the revision of the State's system of financing education.

HEADNOTES

Schools — State's Method of Financing Public Education

1. The State's method of financing public education in the more than 700 school districts, by relying primarily on local real property taxes to finance public elementary and secondary education, improperly denies to students in poor school districts with low real property wealth, which districts must exert above average tax efforts only to realize below average expenditures, those education resources available to students in other wealthier districts with high property valuations per pupil, which districts have been able to spend large sums on public education with lower than average tax efforts, resulting in high taxes and underfinanced schools for people in low-wealth districts and lower taxes and well-financed schools for the more fortunate. Although intended to equalize the ability of school districts to finance education, the 1974 State aid to education formula (L 1974, chs 241, 718), providing 40% of the funds required to defray total expenditures of all the school districts in the State by supplying a district unable to raise $1,200 per pupil by a levy of a 15 mill tax on its own tax base with the amount necessary to reach that level and further assuring no decreases in State aid by the application of save-harmless provisions, does not eliminate the gross disparities in per pupil expenditures among the districts resulting from the

uneven distribution of real property wealth among the districts and the imposition of the same 15 mill tax rate, and instead, by linking property wealth to school spending, makes it easier for wealthier districts to achieve high levels of spending while making it difficult, if not impossible, for poorer districts to do so.

Schools — State's Method of Financing Public Education

2. The inability of school districts having comparatively low real property wealth to attain the per pupil expenditure levels of school districts possessing higher property wealth in the same county or region due to the State's primary reliance on local real property taxes to finance public education, and the failure of the State aid program to eliminate the gross disparities in expenditures among the districts produced by the reliance on local real property taxes (L 1974, chs 241, 718), has significant negative consequences for school districts with relatively low property wealth, in that such districts must tax property at much higher rates to reach the same or lower levels of expenditure than is the case in districts with higher property wealth, and can, therefore, not match the ability of districts with greater real property wealth to offer such educational advantages as small class size; experienced and effective teachers; low pupil-teacher ratios; curricular breadth; extensive extracurricular programs; modern equipment; and special programs for the disadvantaged or the specially gifted.

Schools — State's Method of Financing Public Education

3. The 1974 State aid to education formula (L 1974, chs 241, 718), measured by the full value of real property value behind each resident student in average weighted daily attendance arrived at by dividing the district's total real property valuation by the number of pupils in average daily attendance, although intended to equalize the ability of school districts to finance education, is flawed in the case of large urban school districts where real estate valuations per pupil are relatively high because of the presence of various types of real property with high value, since, in actual operation, the State aid formula, in undertaking to grant operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education, overstates the capacity of cities to finance their schools by disregarding the "municipal overburden" drain of noneducational services on the local tax dollar caused by the unavoidable higher costs for police and fire protection, health care and public assistance, mass transit, parks and recreational facilities and public housing. As a result of the inadequate measurement of local incapacity, the large urban school districts rendered poorest in school finance resources because of their greater municipal services, burdens and school costs, are treated as wealthy and receive far less State aid than other school districts that have more local resources for providing education to their pupils.

Schools — State's Method of Financing Public Education

4. The 1974 State aid to education formula (L 1974, chs 241,718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education measured by the full value of real property behind each resident student in average weighted daily attendance arrived at by dividing the district's total real property valuation by the number of resident pupils in average daily attendance, is defective with respect to the large urban school districts by reason of the failure to take into account the higher per pupil education costs in urban areas caused in large part by the need to pay higher teacher salaries. By

failing to take into account the reduced purchasing power of the urban education dollar, the State aid formula has exaggerated the actual capacity of the cities to finance their schools from local revenues.

Schools — State's Method of Financing Public Education

5. The 1974 State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance rather than on the basis of enrollment, arrived at by dividing the district's total real property valuation by the number of pupils in average daily attendance, is defective with respect to the large urban school districts by reason of the failure to recognize the financial impact of high pupil absenteeism in the city schools caused by poverty and its associated problems resulting in lower city school attendance rates which in turn inflates the assumed amount of real property wealth behind each pupil, thereby reducing the formula's operating expense aid for each aidable pupil unit. The State aid formula's use of pupil attendance instead of pupil enrollment as a measure for State aid overstates the cities' actual fiscal capacity and penalizes them for their high rates of absenteeism.

Schools — State's Method of Financing Public Education

6. The 1974 State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education, computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, discriminates against the large city school districts with respect to the additional aid given for disadvantaged and nonseverely handicapped pupils in the city districts since the formula providing for extra weightings and special services for such pupils is applied to the reduced aid per pupil unit which itself was arrived at by using a measure which overstates and exaggerates the fiscal capacity of the cities to finance educational needs, by failing to give effect adequately to the factors of "municipal overburden", the reduced purchasing power of the urban education dollar and high absenteeism, thereby reducing basic operating aid per pupil with the result that the urban districts receive less extra aid than other districts for each special needs pupil despite the fact that the greatest concentration of special needs pupils is in the city districts.

Schools — State's Method of Financing Public Education

7. The 1974 State aid to education formula (L 1974, chs 241, 718), providing extra aid for secondary school pupils in recognition of the increased costs of providing education at the secondary school level, discriminates against the large urban school districts by failing to allow secondary weighting for disadvantaged and handicapped pupils in the urban secondary schools which have the highest concentration of such students at the secondary level, ignoring the extra costs involved in educating such students.

Schools — State's Method of Financing Public Education

8. The 1974 State aid to education formula (L 1974, chs 241, 718), which calculates aid to the five largest city school districts for their nonseverely handicapped and occupational education pupils on the basis of a mechanism which uses the amount of city property wealth behind each pupil in average daily attendance, a mechanism which overstates the fiscal capacity of the

cities to finance educational needs by failing to take into account specific burdens of the large cities and their school districts resulting in less State aid, discriminates against the large urban districts by excluding them from receiving aid under the more favorable aid formula for such students available to noncity school districts participating in the Board of Co-operative Educational Services with the result that the large city districts receive below average supplemental aid for those categories of pupils despite the fact that such districts have the highest concentration of students with special needs.

Schools — State's Method of Financing Public Education

9. The 1974 State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, a measure which overstates the fiscal capacity of the large city school districts to finance education needs, in disregarding the education overburden of the large urban school districts stemming from urban poverty and its associated ills including the larger numbers of students with impaired learning readiness and progress needing compensatory education programs, the disproportionate numbers of pupils with mental, emotional and physical health problems, the greater number of handicapped pupils, foreign language children and occupational education students and higher student absenteeism, deprives children in the large city districts of an equal education opportunity.

Constitutional Law — Equal Protection Review of State's School Finance System

10. The "strict scrutiny" standard of review utilized when the alleged statutory discrimination is based on a "suspect category" such as race or gender or when the alleged discrimination impinges on a constitutionallly protected "fundamental interest", is not the proper standard of review for determining whether the State's school finance system, in relying primarily upon local real property taxes to finance public education, violates the Federal equal protection clause since, for Federal equal protection purposes, the right to education is not a fundamental right entitled to special constitutional protection. Additionally, although education is an interest of great State importance, the right to education in New York is not such a fundamental constitutional right as to invoke special constitutional protection by use of the strict scrutiny standard of review under the State's equal protection clause.

Constitutional Law — Equal Protection Review of State's School Finance System

11. The appropriate standard of equal protection review to determine whether the State's school finance system, in relying primarily on local real property taxes to finance public education, denies equal protection to property-poor districts (NY Const, art I, § 11), is the "sliding scale" test lying between the strict scrutiny standard at one extreme and the rational basis test at the other, whereby the challenged discriminatory statutory scheme is examined to determine if it "satisfies a substantial State interest" and whether the discriminatory treatment has a "substantial basis in actuality, and is not merely conjectural" furthering "some legitimate articulated governmental purpose". (See *Matter of Alevy v Downstate Med. Center*, 39 NY2d 326.) If it is found that a substantial State interest is served by the

discriminatory scheme, a "further inquiry must be made as to whether the objectives being advanced by the policy could not be achieved by a less objectionable alternative".

Schools — State's Method of Financing Public Education

12. Measured by the "sliding scale" standard of equal protection review, lying between the strict scrutiny standard for "suspect" categories and the rational basis test, whereby, if a substantial State interest is served by a discriminatory statutory scheme, a further inquiry must be made as to whether the objectives being advanced by the policy could not be achieved by a less objectionable alternative, the State's method of financing public education, relying primarily on local real property taxes to finance public education coupled with the State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident pupil in average weighted daily attendance, designed to satisfy the State's obligation to "provide for the maintenance and support of a system of free common schools" (NY Const, art XI, § 1), denies equal protection of the laws (NY Const, art I, § 11) to property-poor districts, which, though imposing sharply higher tax rates, have not been able to attain the spending levels of wealthier districts able to spend large sums on public education with lower than average tax efforts. The markedly unequal distribution of real property value among the State's school districts means a correspondingly unequal access to taxable real property wealth, which in turn means that the imposition of any given tax rate to such widely differing tax bases necessarily yields disparate revenues per pupil. The express linkage of district property wealth and district spending in the State aid formula, which assumes a hypothetical spending norm of $1,200 per pupil and provides State aid to districts to raise funds necessary to reach that spending level provided the districts levy a 15 mill tax on their own tax bases, makes it highly probable that districts with greater wealth will spend more per pupil than their poorer counterparts by reason of their ability to raise substantially more than $1,200 per pupil by the imposition of tax rates lower than 15 mills. Alternative, less objectionable methods of funding public education now in effect in other States are available for consideration by the Legislature which is the proper body to determine what best suits the needs of New York.

Schools — State's Method of Financng Public Education

13. The State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, in addition to denying equal protection of the laws (NY Const, art I, § 11) to property-poor districts under the "sliding scale" equal protection review, also fails the less stringent rational basis test under which an alleged discriminatory statutory scheme can be justified if rationally calculated to further legitimate objectives, since the plenary operation of the State aid formula based on the use of a complex formula which operates as a function of the property wealth of the school districts, the continued distribution of flat grants even to school districts having the greatest property wealth, and the blanket use of "save-harmless" provisions which render inoperative details of the State plan, does not bear a rational

relation to the objectives for which it was devised of correcting and overcoming inequities caused by the inability of property-poor districts to achieve the levels of educational expenditures attained by school districts with higher-valued tax bases, and instead perpetuates such inequities.

Schools — State's Method of Financing Public Education

14. Although the State's delegation of responsibility to local school districts to generate a substantial portion of education funds from their own local resources does not constitute an impermissible abdication of the State's constitutional responsibility to "provide for the maintenance and support of a system of free common schools" (NY Const, art XI, § 1) since the Constitution only demands responsibility for the end product, the manner in which the State provides funds to local districts for the "maintenance and support of a system of free common schools" granting operating expense aid to local districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance without adequate recognition of the varying capabilities of districts to raise educational funds through taxes levied on disparate real property tax bases, fails to meet the State's constitutional obligation by failing to correct the disparities in the availability of locally raised educational funds caused by the primary reliance on local real property taxes to finance public education.

Constitutional Law — Equal Protection

15. The principle of equal protection of the law does not prohibit the State from treating different classes of persons in different ways provided that the statutory classification for purposes of according different treatment rests upon a reasonable rather than an arbitrary basis and is founded upon a difference that bears a fair and substantial relation to the purpose of the statute in order that all persons who are similarly situated are treated in the same way.

Schools — State's Method of Financing Public Education

16. The State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, although intended to equalize the disparate fiscal capacities of the State's numerous schools districts to finance public education, in its operational effect, denies equal protection of the law (NY Const, art I, § 11) to large city school districts by applying to the large city school districts the same yardstick of fiscal capacity as is applied to nonurban school districts without giving adequate effect to certain overburdening conditions that affect the large cities and the schools located within their boundaries such as the drain on large city tax dollars caused by the need to provide an enormous amount of noneducational services; the diminished value of the dollar allocated to city school purposes; the increased school costs caused by the far higher rates of student absenteeism prevailing in the large city schools; and the increased costs caused by the far greater concentrations and numbers of disadvantaged, handicapped and other students with special needs. The use of a flawed measure of fiscal capacity overstates the fiscal capacity of large city school districts to finance public education thereby classifying them as less deserving of State aid, a classification that bears no reasonable relation to the aid statute's purpose of providing State aid to districts in proportion to their need, and is, therefore, discriminatory.

Constitutional Law — Equal Protection

17. The State equal protection clause (NY Const, art I, § 11), affording the same equal protection coverage as the Fourteenth Amendment of the Federal Constitution, permits the State to legislate different kinds of treatment to different classes of persons provided that the classification is not arbitrary but made on a reasonable basis so that all those in similar circumstances are treated alike, but prohibits the State from prescribing different treatment for persons it places in different classes on the basis of criteria that are unrelated to the purpose sought to be achieved by the statute.

Schools — State's Method of Financng Public Education

18. A decision of the United States Supreme Court upholding the constitutionality of the Texas school finance system after applying the "rational basis" test as the standard of equal protection review, rejecting the more stringent "strict scrutiny" test upon the ground that "wealth" was not a suspect category and that education was not a fundamental interest protected by the Federal Constitution (see *San Antonio School Dist. v Rodriguez*, 411 US 1), does not bar a finding that the State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, in its operational effect, denies equal protection of the law to large city school districts under the State Constitution (NY Const, art I, § 11) as tested by the rational basis standard of review, by failing to give adequate effect to the overburdening factors affecting large city school districts resulting in the overstatement of the fiscal capacities of such districts to finance public education thereby classifying them as less deserving of State aid, a classification that bears no reasonable relation to the purpose of the aid statute of providing State aid to districts in proportion to their needs, and is, therefore, discriminatory. Since the breadth of equal protection coverage is the same under both State and Federal equal protection clauses, the State aid statute is also violative of the Fourteenth Amendment of the Federal Constitution.

Schools — State's Method of Financing Public Education

19. The State aid to education formula (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, by providing reduced aid per pupil and reduced supplemental aid per special needs pupil to the large city school districts and by failing to take into account adequately the major education overburdens of the large city school districts, including their large numbers of pupils lacking in basic minimal education skills violates the education clause of the State Constitution (art XI, § 1) which imposes on the State the obligation to assure to each school child an educational program that is appropriate to that child's needs and guarantees to all children of the State an equal opportunity to acquire those basic minimal educational skills necessary to function as a citizen in a democratic society. Where it is demonstrated that there is a greater need, a greater amount of State aid must be furnished if equal educational opportunity is to be available. The failure to furnish more than average aid to those school districts with

greater needs is tantamount to excluding many under-achieving pupils from the educational program.

Schools — State's Method of Financing Public Education

20. The State aid to education statute (L 1974, chs 241, 718), granting operating expense aid to local school districts in proportion to their lack of taxable resources for financing public education computed on the basis of the full value of real property behind each resident student in average weighted daily attendance, in failing to give effect to the inordinate education overburdens of the large city school districts and as a result providing them with less State aid, operates in a discriminatory fashion by denying large numbers and concentrations of pupils in large urban school districts, seriously deficient in basic minimal education skills, an opportunity for meaningful participation in the educational program thereby violating the requirements of equal protection of the law under both the State and Federal Constitutions. Since equal treatment of unequals can be discriminatory, providing less favorable treatment of unequals must be regarded as even worse discrimination.

Schools — State's Method of Financing Public Education

21. New York State's system for financing public schools, relying primarily on local real property taxes to finance public education, and the State aid to education formula (L 1974, chs 241, 718), which, being measured by the full value of real property behind each resident student in average weighted daily attendance, does not eliminate the gross disparities in the allocation of education resources caused by the decision to rely chiefly on the local property tax to finance public education, are unconstitutional in operational effect, denying equal protection of the law to both property-poor districts, which, though imposing sharply higher tax rates, have not been able to achieve the levels of educational expenditures attained by wealthier school districts, and to large urban school districts whose fiscal capacities to finance education have been overstated, resulting in the receipt of less State aid, by the aid formula's failure to take into account adequately the municipal and education overburdens of the large city districts. Under the well-established principle that courts should not grant relief in a manner likely to produce disorder and confusion in public affairs, such declaration of unconstitutionality shall have prospective effect only and shall not prevent the continued operation of the State's school system under existing statutes nor invalidate past or future obligations incurred for the operation of the school system pursuant to the applicable statutes in order to afford the Legislature an opportunity to develop a suitable plan for the revision of the State's system of financing public education.

TOTAL CLIENT-SERVICE LIBRARY[a] REFERENCES[*]

9 NY JUR, Constitutional Law §§ 286 et seq; 52 NY JUR, Schools, Colleges, and Universities §§ 702 et seq.

CLS, New York State Constitution, Art I § 11, Art XI § 1

16 AM JUR 2d, Constitutional Law §§ 485 et seq; 68 AM JUR 2d, Schools §§ 91 et seq.

[*] By the Publisher's Editorial Staff

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OPINION OF THE COURT

L. KINGSLEY SMITH, J.

NATURE OF LITIGATION

Within the framework of this litigation are found dual challenges to New York's method of financing elementary and secondary public school education. Proceeding upon separate but related theories, two groups of plaintiffs each seek a judgment declaring that such method of educational financing violates provisions of the Federal and State Constitutions.

THE ORIGINAL PLAINTIFFS

The group of plaintiffs responsible for instituting the action as it was originally constituted are, for the sake of clarity and convenience, referred to as the "original plaintiffs". This group is comprised of 27 school districts situated in 13 counties and 12 school children, represented by their parents or guardians, who are students in public elementary or secondary schools operated by seven of the plaintiff school districts.

THE PLAINTIFFS-INTERVENORS

After an action had been instituted by the original plaintiffs, a second group of plaintiffs sought and was granted the right to intervene in that action. That group is referred to as

the "plaintiffs-intervenors" and sometimes as the "intervenors." It includes the Boards of Education of the Cities of New York, Rochester, Buffalo and Syracuse; the City of New York itself; certain officials of the so-called "Big Four" cities; the United Parents Associations of New York, Inc.; and 12 school children, represented by their parents or guardians, who are students in public schools operated by the named city school districts. The Board of Education of the City of Buffalo was included as one of the original plaintiffs and thus is a member of both groups of plaintiffs.

THE DEFENDANTS

The defendants are the Commissioner of Education of the State of New York, the University of the State of New York, the Comptroller of the State of New York, and the Commissioner of Taxation and Finance of the State of New York.

THE COMPLAINT OF THE ORIGINAL PLAINTIFFS

[1] The original plaintiffs set forth three causes of action in their complaint. The first cause of action contains allegations delineating facts which are alleged constitute a violation of the equal protection clause of the State Constitution (art I, § 11). More particularly, the first cause of action's essential allegations embrace the matters that follow. New York has created over 700 school districts with power to levy and collect taxes on the real property within district boundaries and to retain such tax revenues to finance public education within each district. Cities with populations exceeding 125,000 have themselves been given similar powers. By decision of the State, local property taxes are the primary source of funds for the support of public elementary and secondary education. The school districts have grossly unequal amounts of real property wealth. Because of this, the application of any given tax rate yields grossly unequal revenues per pupil. Districts poorer in real property wealth, such as the plaintiff districts, levy taxes at substantially higher rates than neighboring districts having greater real property wealth but are unable to match the latter in expenditures per child or in the provision of educational services.

Although the State contributes from its general revenues to supplement local tax revenues, such State aid does not eliminate the gross disparities in the allocation of education re-

sources caused by the decision to rely chiefly on the local property tax to finance public elementary and secondary education.

The formula contained in the Education Law to supplement locally raised revenues is structurally unable to remedy the disparities caused by the decision to rely chiefly on the local real property tax to finance public education.

Because the State's schools finance system relies principally on local real property taxes and because the State aid program does not eliminate the disparities produced by such reliance, there have been and will continue to be gross disparities in per pupil expenditures among the districts. Those disparities are a function of the uneven distribution of real property wealth among the school districts.

The disparities in expenditures per pupil resulting from variations in local real property wealth produce substantial differences in what school districts are able to provide for their pupils. Districts that are poorer in real property wealth, such as the plaintiff districts, cannot match the ability of districts with greater real property wealth to offer educational advantages such as: small class size; experienced and effective teachers; low pupil-teacher ratios; curricular breadth; extensive extracurricular programs; modern equipment; and special programs for the disadvantaged or the specially gifted.

By virtue of the foregoing, the original plaintiffs assert in their first cause of action that the State's method of financing public education "denies to plaintiff students and their parents those educational resources available to students in other, wealthier districts in the State." Further, that such system prevents the plaintiff districts from carrying out their full responsibilities and obligations to the schools, parents and children and compels them to offer an education inferior to that offered by other districts possessing greater real property wealth.

In the second cause of action facts are described that are alleged to constitute a violation of the education article of the State Constitution (art XI, § 1). The gist of the allegations follows. The education article requires the State to create a State-wide system of free common schools in which all children may be educated. It is alleged that the State has failed to meet that obligation. The method chosen by the State for financing public schools does not create any uniform Statewide system. Rather, it establishes over 700 different school

systems with widely differing capacities to provide educational resources to which the State has delegated its own constitutional responsibility to establish and finance public schools where all children of the State may be educated. Because such method compels each district to depend on its own local property wealth as the primary measure of resources available for its children's education, and because those resources vary greatly from district to district, there is no uniformity in resources available for educational purposes from one district to another.

Noneducational demands upon the local real property tax base, the costs of educational services and the educational needs of particular children or groups of children vary greatly from district to district. These factors serve to exacerbate the inequalities arising from the uneven distribution of real property wealth.

Accordingly, there is no assurance that any two pupils, who are alike except for their place of residence being in different school districts, will be afforded equivalent educational advantages. By accident of greater real property wealth, one district may be able to offer a group of educational features which another district, by the accident of having lesser property wealth, is unable to offer its pupils.

In choosing a school finance system that permits such gross disparities to exist, the State has failed to meet its constitutional obligation to provide a "system" in which "all the children" of the State may be "educated."

Such a system, it is alleged, also denies to some children, based on the lesser real property wealth of their school districts, the means to participate meaningfully as citizens and to function successfully in the labor market.

In summary, by making the extent to which a child may be educated a function of the real property wealth of the school district in which that child happens to reside, or the school district in which that child's parents are able to afford to live, the State has violated the democratic and egalitarian intention that underlies the education article, substituting in its stead an impermissible reliance on the accident of real property wealth as the ultimate determinant of the quality of education available to the children in any particular part of the State.

The third cause of action sets forth facts which are then alleged to constitute a violation of the equal protection clause

of the Federal Constitution. The essence of these allegations follows.

It is first alleged that the Federal equal protection clause forbids a State to make allocation of educational resources among its school children a function of real property wealth in the school districts where the children happen to reside.

Because the State's school finance system relies chiefly on revenues generated by local property taxes and because the State's own basic aid formula is inadequate to compensate for the disparities caused by such reliance, the level of expenditures for any child's public school education and the consequent quantity and quality of educational services available to him are a function of the real property wealth of the school district in which he lives.

By reason of the foregoing, it is alleged that the State's financing system violates the Federal equal protection clause. The following statement in the court's decision on the defendants' motion for summary judgment rendered April 9, 1976 is pertinent to this cause of action: "That portion of the original plaintiffs' action which alleges violation of the Equal Protection Clause of the Federal Constitution is not being pressed in the light of the United States Supreme Court decision in *San Antonio School District v. Rodriguez*, 411 U.S. 1. That claim has not been abandoned but expressly reserved in the event the Supreme Court reconsiders its holding in the last cited case (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, p. 8)."

THE AMENDED COMPLAINT OF THE PLAINTIFFS-INTERVENORS

The amended complaint of the plaintiffs-intervenors sets forth two causes of action. Each cause of action alleges that the State aid statute which provides operating expense aid to school districts violates the equal protection clause and the education clause of the State Constitution and the equal protection clause of the Federal Constitution as well.

In the first cause of action unconstitutionality is predicated upon allegations to the effect that the statute, in undertaking to grant operating expense aid to local districts in proportion to their lack of local taxable resources for financing public education, employs so arbitrary and inadequate a measure of local incapacity that the large urban school districts rendered poorest in school finance resources because of their greater

municipal services, burdens and school costs, are treated as wealthy and receive far less State aid than other school districts that have more local resources for providing education to their pupils.

In the second cause of action the plaintiffs-intervenors allege unconstitutionality for the following reason. The aid statute, in undertaking to grant special assistance to school districts for their pupils requiring compensatory schooling services, arbitrarily and inequitably grants less and inadequate aid per pupil in the largest urban districts having the highest concentrations of such pupils and thus the greatest need for compensatory school services with which to provide them learning opportunities.

THE ANSWER OF THE DEFENDANTS

The position of the defendants in opposing the claims of the two groups of plaintiffs is set forth in a single answer organized into a series of 28 defenses, the last of which contains denials and admissions of particular allegations in both complaints. Because certain matters raised by the answer became the subject of defendants' motion for summary judgment which was determined prior to trial, only the principal topics embraced by the series of defenses that may be regarded as surviving that determination need be summarily described at this point. These include the assertion that legislation relating to State aid is based on rational policy determinations made by the Legislature and therefore constitutes a valid exercise of legislative power. It is also claimed that by the enactment of various provisions of the Education Law, the Legislature has met the constitutional mandate imposed by the education article of the State Constitution.

Other defenses include these assertions:

- The statutes that are the subject of this litigation make no distinction based upon personal wealth.

- Primary and secondary education is not funded principally by taxes on real property.

- The Education Law does not require that an unfair proportion of support for education be borne by the local real property tax.

- The provisions for a minimum flat grant to each school district insure that every district receives some share of the

appropriations from general State revenues for its education program.

- The determination of "municipal overburden" and the weight accorded thereto is a question of public policy to be made by the Legislature through the poltical rather than the judicial process.

- The grievances complained of by the two groups of plaintiffs should be addressed to the Legislature for redress rather than to the court.

THE RELIEF SOUGHT

The original plaintiffs seek a judgment declaring that the State's method for financing public schools violates some or all of the constitutional provisions earlier mentioned. In addition, they ask that the court retain jurisdiction of the action for a reasonable period of time to permit legislative enactment of a new school finance system that is not violative of either constitutional provision. If the Legislature fails within a reasonable time to correct the violations alleged by the original plaintiffs, then the court is asked to issue an injunction against the continuation of the present school finance system.

The plaintiffs-intervenors request a judgment declaring that the school finance system violates the State and Federal constitutional provisions earlier described for the reasons set forth in their complaint. They also seek to have the judgment include a declaration that the Legislature must make corrections in the State operating expense aid formula to overcome the defects that the court is asked to find currently exist. It is also requested that the judgment redirect State funds to school districts on an interim basis if the Legislature fails within a reasonable time to take corrective action. The plaintiffs-intervenors request that the court retain jurisdiction of the action for a period of time to assure enactment of modified State school aid provisions that do not violate either the State or Federal Constitutions.

The ultimate relief sought by the defendants is the dismissal of the complaints of both groups of plaintiffs.

[Material omitted for purposes of publication.]

STRUCTURE OF DECISION AND FINDINGS OF FACT

The procedural course chosen by the parties, involving presentation of proposed findings of fact before final submis-

sion of the case, has required that the court render its decision and simultaneously prepare findings of fact. The fact that they are being made at the same time requires that there exist a correlation between them. Consequently, it is appropriate to point out certain features of the organization and structure of both the findings of fact and the decision.

With clarity and ease of review in mind, the court chose not to construct *de novo* findings of fact. Instead, after analyzing the proposed findings of fact submitted by the two groups of plaintiffs and reviewing the evidence relevant and material to them, the court has adapted the documents containing such findings in a manner that reflects the disposition made of the numerous requests to find. This has been accomplished, it is believed, by a process of retention, deletion and modification. Proposed findings that were adequately supported by the evidence have been made the court's findings by leaving them intact. Other proposed findings that in the court's view were not so supported or that have been deemed otherwise unacceptable or inappropriate have been physically deleted by a method which nevertheless has preserved their original legibility. As to those proposed findings which were deemed acceptable with modification or correction, appropriate modifications or corrections have been made by striking objectionable language or inserting modifying language or both.

In the course of revising the proposed findings, the court has retained to the extent practicable the references to evidentiary sources that provide support for particular findings. This has necessitated an independent item by item examination of the cited material and a determination concerning matters of accuracy, relevance and probative effect. It was of course, inevitable that in documents of such length, complexity and detail some unintended errors would occur. Where the court discovered through its own independent check of cited matter that it was incorrect, inapposite or deficient in the probative force claimed for it, a revision was made by insertion of necessary corrections or by deletions done in such a way that on review the original version as proposed can still be read.

The organization of the decision generaly parallels the findings of fact and is intended to complement and in some instances to supplement them. Preceding segments of the decision have described various aspects of this litigation having to do with the origin of the lawsuit, identity of parties, nature of the claims being litigated, the period devoted to the

trial and the results of the work done during the posttrial period. There follows next a discussion of certain matters that have a common bearing upon the claims of both sets of plaintiffs. The nature of such matters is such as to permit a unified rather than a separate treatment particularly in view of the fact that the material is amply supported by the evidence and stands substantially uncontroverted by the defendants. Those matters relate to the historical development of State aid for education in New York and the manner in which State aid legislation operated at the times relevant to this litigation. The decision then addresses itself to the original plaintiffs' case and the facts found to have been estalished therein. Following the order of the trial, the decision next considers the case of the plaintiffs-intervenors and the facts found to have been supported by the evidence. There are treated in the concluding portions of the decision the respective legal conclusions which flow from the facts found in respect of the claims of each group of plaintiffs.

[Material omitted for purposes of publication.]

THE 1974 STATE AID LEGISLATION

The principal features of the 1974 legislation which were pertinent and applicable at the time of trial (L 1974, chs 241, 718) were described by several witnesses and in certain of the trial exhibits. In broad outline, these features formed a pattern now described.

The plan called for State assistance to enable each district to raise $1,200 per pupil by levying a 15 mill tax on its own tax base. If the 15 mill tax levy resulted in a figure less than $1,200 per pupil, the State supplied the amount necessary to reach that level. The statute provided a special method for counting pupils as part of the process of determining how the State aid was to be distributed. This involved refinements beyond the mere calculation of the average number of pupils present on each regular school day in a given period. In order to give recognition to differences in the cost of educating children at different school levels as well as cost differences in educating children whose physical, mental, emotional or socioeconomic background called for educational techniques adapted to their particular needs, various weightings were provided to produce a pupil count reflective of such specialized factors.

Under a strict application of the aid formula just described,

a school district with full property value of more than $80,000 would automatically be rendered ineligible for State aid (15 mills × 80,000 = 1,200). There was included in the 1974 State aid statute a so-called "flat grant" provision, however, which assured that every school district, regardless of its property wealth, would receive a minimum sum from the State. By the use of a formula applicable to districts with full valuation ranging from $52,800 to $101,000 there results a decrease of aid per aidable pupil unit from $408 at a valuation of $52,800 to $360 at a valuation of $101,000. A district with a full valuation above $101,000 is guaranteed a minimum of $360 in State aid per aidable pupil unit.

The other features included in the 1974 aid statute operate to cause all but a few school districts to receive State aid on a basis altogether different from the workings of the aid formula with its various weightings. These features are the so-called "save-harmless" provisions of the statute. There are two types of save-harmless provisions. The purpose of each is to guarantee that a district will receive at least as much State aid this year as it received last year. Under what is called "per pupil save-harmless" a school district is guaranteed that it will receive at least as much aid per aidable pupil unit in the current year as it did in the preceding one. That type of save-harmless aid is important to growing districts. With property valuations rising, districts growing moderately in pupil population but rapidly in property value become wealthier causing a reduction in the amount of State aid per pupil. The "per pupil save-harmless" provisions of the statute negate the operation of that part of the State aid formula that would otherwise control under those conditions.

The other type of save-harmless provision is called "total save-harmless." It provides that a school district will not receive less total State operating expense aid in the current year than it received in the preceding one. This type of save-harmless provision is particularly helpful to school districts that are losing pupil population since they continue to receive the same amount of State aid even though they have fewer pupils and this, in turn, means that they actually receive more money per pupil. The inclusion of save-harmless provisions in statutes governing State aid did not start with the 1974 legislation. At the time of the enactment of the 1974 changes in the State aid formula there were over 300 school

districts receiving State aid on the basis of save-harmless provisions under the so-called Diefendorf Law.

Evidence at the trial showed that because of declining school populations and increasing property values, almost all school districts found it to their financial benefit to calculate State aid entitlements on the basis of one or the other of the save-harmless provisions. At the time of trial the evidence was that 699 of the State's 708 major school districts were operating under save-harmless provisions of the 1974 State aid law. It was also shown that 18 districts were receiving aid based on their 1965 entitlement as the result of the use of save-harmless calculations. The almost total use of save-harmless provisions operates to vitiate the equalizing purposes of the State aid formula and perpetuates inequities that were supposed to have been corrected or at least ameliorated.

Finally, the 1974 legislation provided additional types of State aid for such things as buildings, transportation, Boards of Co-operative Education Services (BOCES) as well as for various types of categorical programs.

Having described the development of State aid to education in New York and its basic design as embodied in the 1974 legislation, attention is now directed to the facts developed at the trial in support of the claims of the original plaintiffs.

THE ORIGINAL PLAINTIFFS' CASE

NEW YORK'S SCHOOL FINANCE SYSTEM IN OPERATION

The funds to support the public schools in New York come primarily from two sources. The first of these consist of revenues generated by taxes imposed, except in the case of cities, by independent school districts on real property situated with school district boundaries. In the case of cities (whose school districts are often referred to as "dependent") revenues generated by tax levies on real property together with revenues from other sources provide funds to defray the costs of municipal services of which education is but one.

The second source of funds for public education in the independent as well as dependent school districts is State aid money appropriated and distributed under the various provisions of the State aid statute. A third source of funds is Federal aid. As a component of all the revenues available for school finance in New York, the evidence demonstrated that Federal funds provide a relatively small proportion of the total, usually running below 5%. At the time of trial, State

aid of all kinds provided about 40% of the funds required to defray total expenditures of all the school districts in the State. Thus, the major portion of school financing comes from revenues raised by local taxation.

It is evident from the basic pattern of the 1974 State aid legislation earlier described that a particular school district's capacity to provide local financing of the cost of operating its public schools is directly tied in with its taxable real property wealth.

The several hundred school districts of the State display a wide range in real property wealth available for use as the tax base to provide local revenue for support of public schools. This has been demonstrated by a special study prepared by Dr. Joel Berke, a witness for the original plaintiffs, from official data supplied by the State Education Department. It is similarly documented in studies prepared by witnesses called by the defendants.

Dr. Berke's analysis revealed that in the 1974-1975 school year, the range in real property wealth among school districts extended from $8,884 in the poorest district to $412,370 behind each pupil in the wealthiest district, a ratio of 46 to 1. Excluding all districts falling in the category of the wealthiest 10% and those found in the poorest 10%, the same study found that the disparity in taxable real property wealth was still present. Specifically, the school district at the 90th percentile had over $86,000 in full value while the school district at the 10th percentile had only $20,840, a ratio of more than 4 to 1. Whereas the average district wealth was $49,000, Dr. Berke's study showed substantial numbers of school districts having property wealth greatly different from the average. Property wealth of less than $20,000 of full value per pupil was found in 58 districts and another 149 districts had less than $28,000 of full value per pupil. The study also revealed that there were 162 districts with more than $60,000 of full value per pupil.

The disparities in real property wealth are wide even within individual counties of the State. The same study showed that in Nassau County there were three large districts (Manhasset, North Shore and Great Neck) with more than $124,000 of full value per pupil and three other large districts (Levittown, Roosevelt and North Merrick) with approximately $30,000 full value per pupil. In neighboring Suffolk County there were three districts with over $370,000 in full value per pupil and

three others that had less than $27,000 of full value per pupil. In Westchester County the range extended from one district with over $330,000 of full value to others with less than $37,000, a ratio of nearly 9 to 1.

Large numbers of school children are affected by these disparities in real property wealth. Only 18% of New York's pupils live in school districts that have real property wealth that is within 10% of the average wealth per pupil of $49,000. Over half of the State's pupils (54.7% of the 2.3 million pupils outside New York City) live in school districts whose property wealth is more than 25% above or 25% below such State-wide average real property wealth. In sum, more than half the school children of New York live in school districts having a full value per pupil of more than $61,870 or less than $37,122.

The disparities in real property wealth among New York's school districts and the consequent disparities in the fiscal capacities of those districts have been noted in a succession of studies made under State auspices, some of which were prepared by or under the direction of witnesses called by the defendants.

The 1972 Report of the New York State Commission on Quality, Cost and Financing of Elementary and Secondary Education (Fleischmann Commission) stated: "The evidence appears conclusive that the present system of finance discriminates against low-wealth districts and large districts while favoring the small and rich. These discriminations are contrary to long-established aims of the State to promote equity and, incidentally, to establish efficient organization of school districts, aims which run back a half century in time."

An August, 1973 study prepared for the Working Task Force on State Aid for Elementary and Secondary Schools under the direction of Miss Lois Wilson, a witness called by the defendants, showed a similar pattern of unequal access to fiscal resources among school districts and contained the following comment: "The resources behind pupils in New York State's 719 major operating districts (i.e, districts with eight or more teachers) currently vary by a ratio of about 41:1 according to the State Education Department's 1971-72 basic fiscal data computer run".

In the fourth report of the 1973-1974 Task Force on State Aid for Elementary and Secondary Schools entitled "Historical Perspective on Chapters 241 and 718 of the Laws of 1974" issued in December, 1974 during the administration of Gover-

nor Malcolm Wilson, there appears the following: "Widening disparities in per pupil wealth among the districts have resulted from the uneven incidence of increased property values and declining numbers of school children, making achievement of equalization of educational opportunity increasingly difficult".

In another study dated April, 1975 prepared under the direction of Miss Wilson and entitled "Overview of School Finance Inequities in New York State" the pattern of unequal access to fiscal resources was again noted in the following statement: "New York State has more than 700 major districts with 8 or more teachers. The wealth of these school districts now varies by more than 52 to 1".

The Governor's Task Force on Aid to Education in volume 1 of its report to Govenor Hugh L. Carey dealing with school finance dated April, 1975 said: "The results of this inequitable structure of school finance in New York are similar to the problem in many other states. Local school districts with high property valuations per pupil have been able to spend large sums on public education with lower than average tax efforts. On the other hand, local school districts with low property valuations have had to exert above average tax efforts only to realize below average expenditures. The outcome has been high taxes and underfinanced schools for pooor people and lower taxes and well financed schools for the more fortunate".

The draft analysis prepared under the direction of Miss Wilson in January, 1976 for the Governor's Advisory Panel of Consultants entitled "Inequities in New York State's System of School Finance" made use of data that was somewhat later than that used by Dr. Joel Berke in his analysis. Nevertheless, the later study found that the property wealth of the more than 700 major school districts in the State for the 1976-1977 school year varied by more than 46 to 1. It also found, as did Dr. Berke, that the same pattern of gross wealth differences existed within single counties.

A subsequent study prepared in October, 1976 for the same advisory panel under the direction of Miss Wilson again found that school districts in New York exhibited a wide disparity in property wealth.

Just as there is a wide disparity in property wealth among school districts there is also a wide variation in operating expenditures per pupil in New York's school districts. It is

that variation in operating expenditues which is next considered.

Dr. Berke's study found that the range in district spending per pupil ran from a low of $936 to a high of $4,215, a ratio of 4.5 to 1. When all districts in the top and bottom 10% of the range were eliminated, a pattern of disparate expenditure levels still remained. The school district at the 90th percentile spent $2,051 per pupil while the district at the 10th percentile spent $1,089 or a little more than half of the higher amount. This disparity in expenditures affects not only large numbers of school districts but substantial numbers of school children as well. On the order of 1,750,000 pupils attend schools in the 443 districts that Dr. Berke found spent 25% more or 25% less than the mean operational expenditure of $1,458. If New York City data were to be included, Dr. Berke's study found that an additional 1,000,000 pupils would be added to those outside the middle 50%.

The finding that operating expenditures vary widely among school districts was supported by studies prepared by or under the direction of witnesses produced by the defendants. The two studies prepared for the Governor's Panel of Consultants in 1976, which have previously been mentioned, document this conclusion as is more pointedly described in the findings of fact.

The claim of the original plaintiffs that there is an unmistakable relationship that exists between the patterns of property wealth and the level of educational expenditures in New York's school districts is supported by the evidence. That support is found not only in the study prepared by Dr. Berke for the original plaintiffs but also in the October, 1976 study done for the Governor's Advisory Panel of Consultants and even in the study produced by Mr. Charles Cook for use in the presentation of the defendant's case in this action. Dr. Berke concluded that there was "a direct, positive, and significant correlation between property value and expenditures. That is, the wealthier a district in property value, the more it spends per pupil; the poorer the district, the less it spends." The October, 1976 study for the Governor's Advisory Panel of Consultants noted that for the 1975-1976 school year "there was a marked difference within various per pupil wealth intervals—from an average of $1,789 for the 44 districts with less than $15,000 full value per pupil to $3,744 for the 21 wealthiest districts which have from $120,001 to $330,000 full

valuation per pupil". Mr. Cook's study found that differences in local property wealth are the principal factors in determining expenditure differences, explaining more than 80% of the spending variations.

The method of providing State aid enacted by the Legislature makes it more likely that districts with high property wealth will spend more per pupil than districts with low property wealth. There is an explicit linkage of property wealth to schools spending in the statutory plan because it assumes a spending level of $1,200 per pupil and makes provision for State aid to districts to reach that level of spending provided they impose the same 15 mill tax. Widely different levels of property wealth mean that the imposition of the same tax rate will raise widely differing amounts of revenue. Thus the statutory plan makes it easy for wealthier districts to achieve high levels of spending while making it difficult, if not impossible, for poorer districts to do so. Graphic evidence of the extent to which the imposition of the same tax rate will produce extremely different revenue raising consequences is found in the study prepared by Dr. Berke and is set forth in part in the findings of fact accompanying this decision.

SIGNIFICANT CONSEQUENCES OF DISPARITIES IN EXPENDITURES

[2] The inability of school districts having comparatively low property wealth to attain the expenditure levels of school districts possessing higher property wealth in the same county or region produces significant consequences. The nature of such consequences as revealed by the evidence is delineated in some detail in the findings of fact accompanying this decision. It is deemed sufficient here to mention them in summary fashion.

It is important to keep in mind that the real property within a school district's boundaries is not only the tax base for local school tax revenues but the base for separate and distinct tax levies to support the services supplied by other governmental entities such as counties, towns, villages and certain types of special districts.

An especially burdensome consequence for districts with relatively low property wealth is that such districts are placed in the position of having to tax property at much higher rates to reach the same or lower levels of expenditure than is the

case in districts with higher property wealth. The imposition of high rates of taxation produces serious effects on the residents of and the educational services supplied by districts with low property wealth. In the Roosevelt School District in Nassau County, the evidence showed that the real property tax burden has contributed to substantial numbers of foreclosure actions affecting residential properties and furnished an incentive for persons to move out of the district. The tax burden upon the residents of the Levittown School District in Nassau County has made it increasingly difficult to obtain voter approval of school budgets causing operation of the school system on the basis of a contingency budget, more commonly referred to as an "austerity budget."

Another consequence of disparities in expenditures is the difference in professional staff ratios found in districts having greater property wealth when compared with those with lower levels of property wealth. The study prepared by Dr. Berke found that "with hardly an exception, the higher the expenditure category, the better the ratio between the pupils and professional personnel".

The disparity in expenditure levels has an effect upon class size. There is admittedly no universal agreement among educators as to whether the use of smaller classes has an effect on academic achievement that is measurable by means of standardized tests. This lack of agreement, however, does not alter the fact that school districts possessing the capacity to maintain higher levels of expenditure do, indeed, utilize that capacity to maintain a lower level of over-all class size. In contrast, districts with lower property wealth find themselves lacking the flexibility to do so. Class size is essentially a function of the number of teaching personnel available per pupil. That is to say, the higher the number of teachers in a district, the greater the probability that such district will have sufficient classroom teachers to operate small classes. Inasmuch as teacher compensation is an expensive element in the totality of school expenditures, low property wealth districts find it extremely expensive to reduce class size.

The capacity of a school district to provide a curriculum of variety and breadth is affected by the disparities in expenditures levels. Particular areas affected include such things as educational opportunities for gifted pupils that are provided by advanced placement programs and other advanced courses. Because such offerings entail more teachers and, in some

cases, smaller classes, districts with lower property wealth find it difficult, if not impossible, to provide such programs. Similarly, districts with lower property wealth find themselves unable to provide the continuity of an extended number of years of foreign language study or the variety of foreign language offered as is the case in districts possessing greater property wealth.

Other consequences of the disparities in expenditure levels are reflected in the inability of low property wealth districts to offer adequate programs or courses in the arts and to supplement the instructional program with enriching experiences such as field trips which are available in districts having the capacity to maintain higher levels of expenditures.

School districts with higher levels of expenditures employ teachers with significantly higher median number of years of experience and more masters degrees than is the case with school districts having a lower level of expenditures. The experience and training of teachers is reflected in the salaries they are paid. Observable differences between what high and low spending districts are able to pay for teachers with more advanced levels of experience are found at various steps in teacher salary scales. Because teachers with greater experience and training can command higher salaries, the districts with lower expenditure levels are placed at a disadvantage in recruiting their teachers. The study done by Dr. Berke indicates that lower spending districts are further disadvantaged in comparison to higher spending districts in that they have a much higher percentage of teachers with temporary certification.

As more particularly set forth in the accompanying findings of fact, evidence adduced at the trial points to the conclusion that teacher experience and advanced degrees, whether in their own right or as proxies for other teacher characteristics, affect student achievement in some respects. It must be recognized that controversy exists in educational circles as to whether academic achievement is measurably affected by such considerations as class size or by employment of teachers with greater experience and advanced degrees. But the existence of such divergence of views does not necessarily lead to the conclusion that a school finance system operates equitably which enables districts with higher property wealth to have smaller classes and to hire teachers with more experience and greater training but which, as a practical matter, either

precludes or makes extremely difficult like choices by districts of lower property wealth and the consequent denial of expanded educational opportunities for their pupils.

Under the umbrella title of "Pupil Personnel Services" are found services that are supplied to pupils by members of a school's professional staff other than classroom teachers. The category includes guidance counsellors and school psychologists. Dr. Berke's study showed that districts with the capability of higher levels of expenditures employ more professionals to supply such services than do the districts with lower property wealth. That study found that school districts spending at the lowest levels had only 2.51 pupil personnel staff per 1,000 weighted average daily attendance. Districts spending at the highest levels had 5.94 per 1,000 weighted average daily attendance. The pattern of disparity in the ratios of pupil personnel staff per 1,000 weighted average daily attendance was found both in respect of guidance counselors and school psychologists.

Children with severe speech or hearing impairment require special attention. Such impairments can have impact on a child's learning in the early years in differing ways. If inadequately dealt with in those years, the impairment may continue to impede the child's learning capacity throughout the educational process. Regulations of the Commissioner of Education prescribe the frequency of service for children with such impairments in school districts providing therapy. Other regulations limit the case loads of teachers who service not only children with severe speech impairment but others with speech impairments who do not qualify as being severely speech impaired. Evidence at the trial showed examples of the inability of certain school districts with lower property wealth to provide the level of service mandated for pupils with speech and hearing impairments as well as the measures required to be taken in attempting to do what could be done within their fiscal constraints. In contrast, evidence was presented as being illustrative of the levels of speech and hearing therapy provided by school districts with greater property wealth for children with the same kind of impediments.

Another consequence of the disparities in expenditures between school districts of high property wealth and those with low property wealth is the existence of chronic shortages of supplies and equipment in the low spending districts needed to support an educational program. The findings of fact accom-

panying this opinion set forth the details of this problem and how it has affected particular school districts having low property wealth and low expenditures.

Attention now shifts to a consideration of the case of the plaintiffs-intervenors' proceeding from an initial synopsis of the theories advanced by them to a discussion of the facts elicited at the trial to support the claims made.

PLAINTIFFS-INTERVENORS' CASE

INTRODUCTION

[3] At the outset it is in order to indicate as concisely as practicable the several underlying theories on which this group of plaintiffs (sometimes for brevity's sake called "intervenors") attack the New York State aid system. The intervenors recognize that a major purpose of State aid for public education has long been that of equalizing the ability of school districts to finance education. Also recognized is the fact that the State aid formula challenged in this litigation has the same purported objective. The intervenors claim, however, that the State aid formula is flawed because in actual operation the formula fails to adequately measure the true capacity of large urban school districts to finance public education.

Under the theory of "municipal overburden" the intervenors point to the fact that the State aid formula's basic measure of a school district's ability to finance its schools is the amount of real property value behind each resident student in average daily attendance. In the case of the large urban school districts real estate valuations per pupil are relatively high because of the presence of various types of real property with high value. When applied to the urban school districts, this "property per child" yardstick of fiscal capacity, according to intervenors, produces a distorted and unrealistic picture of true capacity. The difficulty arises from the fact that urban school districts do not themselves levy the taxes which provide revenue to finance public education. The urban school district is dependent upon the city in which it is located to provide it with the funds needed to run the schools. The city levies taxes on the real property within its borders to raise funds to help pay the costs of a variety of municipal services of which education is but one. It is the contention of the intervenors that the inexorable costs of providing a large number of noneducational services reduced the amount of

revenue derived from real property taxation and available to finance education. It is this need to provide those noneducational municipal services which is called "municipal overburden" and which the "property per child" State aid standard does not adequately take into account. Because of this the intervenors claim their school districts are made to appear to have a greater fiscal capacity when in actuality their ability to finance public education is impaired by the need of the cities in which they are located to provide and pay for those other services.

Another theory advanced by the intervenors which encompasses several elements is that of "educational overburden." Under this theory the intervenors claim that costs are higher in metropolitan areas with the result that money available for education costs buys less in such areas. Education costs are increased in the large urban districts because the State aid formula uses average daily attendance instead of school enrollment as a measure to determine State aid thereby overstating the cities' fiscal capacity and penalizing them for their heavy burdens of absenteeism. The intervenors further contend that although they have the greatest concentrations of children with conditions that impede their educational progress, the State aid statute fails to give adequate recognition to the higher costs involved in providing services to such children in need of special types of education.

Finally, the intervenors challenge the state aid scheme for its alleged failure to give adequate recognition to the impact of educational overburdens in the cities. It is contended that the failure to provide State aid with proper allowance for the factors of educational overburden denies educational opportunities to children whose ability to get an education is impeded by a variety of educationally handicapping circumstances or conditions.

Each of the foregoing theories is considered in sequence. The proposed findings of fact submitted by the plaintiffs-intervenors have been reviewed to ascertain whether they are supported by evidentiary material presented at the trial and whether they represent appropriate findings necessary to the court's resolution of the issues presented for determination. By a process of elimination, retention and modification the court has arrived at a set of findings which are regarded as supported by the evidence. Those revised findings of fact, for the most part, contain specific references to the evidence upon

which they are based. The findings of fact as revised are set forth in a separate document clearly showing matter eliminated, retained or modified which is being filed simultaneously with this decision. Such findings are intended to complement and supplement the decision. As has been noted earlier, the filing of findings of fact permits this decision to treat the facts established by the evidence in relatively summary fashion placing emphasis on major points and leaving to the findings of fact a more detailed exposition of the relevant facts.

MUNICIPAL OVERBURDEN

At the trial the intervenors presented extensive evidence to establish the existence of the problem of municipal overburden affecting the large urban school districts and the failure of the State aid statute to reflect that factor in determining the amount of assistance provided. The basic data presented stands largely unchallenged. It demonstrates that the ability of the urban school districts to finance education within their borders is, indeed, seriously impaired by a cluster of demands on the urban tax dollar collectively known as a municipal overburden. In this portion of the opinion and the accompanying findings of fact the character and dimensions of the phenomenon are considered.

The intervenors do not find fault with the objective of the State aid statute here involved, i.e., to provide greater operating expense aid to the district that has a lesser fiscal capacity to finance its schools. But the intervenors point to the fact that the aid formula measures a district's fiscal capacity by the amount of real property value behind each resident pupil in average daily attendance. In addition, the intervenors assert that the aid formula assumes that school districts are equally able to apply revenue from real property taxes levied on their real property tax bases for the support of their schools. This assumption, the intervenors claim, does not square with the facts and they have undertaken to prove that in some districts, such as the large urban district here, the cost of providing essential noneducational services caused a drain on local revenue thereby reducing the amount of money available for educational purposes. In short, it is this municipal overburden which impairs the fiscal capacity of the urban school districts to finance their education systems.

In the four cities involved in this litigation the evidence has shown that the complete tax burden (for nonschool and school

purposes) was substantially higher than was the case in the rest of the State. While jurisdictions outside of those cities were spending about 45% of their local taxes for schools, the cities were spending about 28%. If noneducational expenditures are measured in per capita terms, the four cities spent much more than surrounding counties and the rest of the State. In 1973 the per capita noneducational expenditures in the three up-State cities amounted to more than twice the per capita amount of similar expenditures in the remainder of the counties in which such cities are located. In New York City, using all revenue sources (local, State and Federal), expenditures, in 1974 for noneducational purposes amounted to $875.01 per capita which was more than twice the rate for the rest of the State and much more than was the case in the counties making up its suburbs. After adjusting New York City's revenues so as to exclude Federal and State aid, the per capita expenditure for noneducational purposes in 1974 amounted to $401.06 whereas the figure for the rest of the State, exclusive of New York City, was $183.17. The higher level of noneducational expenditures in New York's "Big Four" cities was not an aberration peculiar to those cities. The evidence showed that those higher expenditure demands for noneducational purposes fit the pattern found in central cities in all of the country's 37 largest metropolitan statistical areas.

The intervenors presented convincing evidence in painstaking detail to establish that the higher noneducational expenditures in the cities are caused by the compelling, irresistible demands for municipal services that the urban environment and its characteristics create.

In New York City characteristics of its population, as well as physical characteristics of the city itself, generate the need for higher noneducational expenditures. The decade between 1960 and 1970 experienced a marked shift in the age distribution in New York City. An increase occurred in persons falling in the 15 to 24 bracket as well as the 65 and over bracket while the number of persons in the 25 to 64 age grouping decreased. The evidence showed a markedly higher proportion of New York City's population to be below the poverty line than was the case in neighboring areas. This has meant increased numbers of persons who are recipients of public assistance. The level of educational attainment in New York City is decidedly lower than that found in the suburbs. The less educated portion of the population depends on manufac-

turing enterprises for employment. Job opportunities have decreased as manufacturing concerns have moved away from New York City. Poverty and unemployment have created conditions which in turn generated demands requiring municipal expenditures.

The density of New York City's population, the condition of its housing stock and the deterioration of municipal facilities because of deferred maintenance all contribute to bringing about high noneducational expenditures. As these demands siphon off the city's revenues the percentage of revenue that can be allocated to education declines.

The conditions, characteristics and circumstances found in New York City were shown to be replicated in the three up-State cities. Concentrations of the poor and the elderly, large numbers of persons on public assistance rolls, high levels of unemployment and low education levels have all combined to increase municipal expenditures. To the foregoing must be added the cost-producing factors of old housing stock, deteriorating municipal facilities and a severe economic decline in recent years. As the findings of fact show in more detail, when individual categories of noneducational municipal services are examined, the cities necessarily spent more than other areas of the State.

Higher police expenditures in the cities were shown to be to a large extent the product of higher crime rates for both adults and juveniles. Contributing factors to higher crime rates have been population density, poverty and unemployment. The result has been that the four cities in this litigation had police expenditures that ran from two to six times greater than was the case in their suburban areas. Special conditions in New York City added to the problem of providing police protection. Those included, among others, a large body of daily commuters, great numbers of tourists, protection of foreign diplomats, drug-related crimes, policing of public events attracting crowds and the investigation of the activities of organized crime.

Fire protection was shown to be far more costly in the cities. The protection afforded by volunteer firemen in most communities has not been feasible for the cities. Density of population and building is a contributing factor to the greater fire protection expenditures in the cities. Constantly available fire-fighting professionals handling a variety of both ordinary and specialized equipment and capable of rapid response to

many differing types of fires have imposed far greater fire protection costs on the cities. These costs in recent years have been exacerbated by tremendous increases in the number of false alarms to which men and equipment have had to respond.

Public assistance for city residents has been shown to be a category of municipal expenditure over which the cities have relatively little control. In New York City public assistance has been a heavy drain on municipal revenues. The evidence showed that although only 43% of the State's population resides in New York City, 70% of the State-wide recipients of public assistance were living in that city. Another dimension of the problem and its cost were revealed by the evidence that 12.5% of New York City's population was on public assistance in contrast to 3.6% for the entire balance of the State. It is important to note that the number of persons eligible to receive public assistance and the type and level of benefits are governed by State and Federal regulations.

Health care expenditures in the cities were shown to be higher than elsewhere as a consequence of conditions prevailing in urban settings. The evidence showed that 67% of the State's population eligible for Medicaid benefits were New York City residents. While the remainder of the State spent $15 per capita from local revenues on Medicaid, New York City spent $51 per capita from its local resources. As was shown to be the case with public assistance expenditures, New York City has had little control over Medicaid expenditures because eligibility for benefits and the kind and level of such benefits were determined by Federal and State authority. These higher health care expenditures in New York City were shown to be a reflection of more serious health problems among the city's population.

Another drain on local revenues in New York City is the corrections system that by State law it is required to maintain. This system's purpose is to hold persons awaiting court proceedings as well as those serving sentences. Factors adding to the city's expense were shown to be the need to transport persons to and from courts, medical examinations and record-keeping. New York City's cost per capita for its corrections system was shown to be approximately four times that borne by other localities in the State.

The court system which New York City must operate has been shown to require an expenditure of $14.72 per capita out

of local revenues at the same time that the rest of the State was paying only $8.07 per capita. The greater expenditure was caused by the greater work load in the city's courts. In the criminal justice field, the evidence established that in 1973-1974 of all the Grand Jury indictments and Grand Jury dispositions in New York State, over 60% were in New York City. Nearly 70% of all the criminal cases disposed of in the entire State were disposed of in New York City.

Mass transit costs imposed a significant demand on local revenues in New York City. According to the evidence, transit operating expenses were $33.39 per capita in that city as compared to a level of only $6.64 in the rest of the State. Since public transportation carries more than half of the 3,000,000 persons, including nonresidents, entering the central business district each day, mass transit is essential for the city's functioning.

Greater city expenditures for parks and recreational facilities were shown to be essential to meet the needs arising from urban density, poverty, old age as well as the needs of the city's youth.

All of the cities in this litigation must subsidize public housing projects for low-income residents. Most suburban and rural jurisdictions do not have that demand on local resources. In addition to being required to pay operating deficits on State-sponsored housing projects, the cities must absorb other indirect costs for fire, police and sanitation services. At the same time tax revenues were reduced by reason of payments in lieu of taxes and tax preferences granted in connection with such projects.

The higher levels of spending for the erection of new schools in the cities were shown to be a reflection of the greater costs for land, labor and materials prevailing there. Because the State's building aid formula failed to provide aid for costs above State-wide averages, the cost differentials affecting cities, to a large extent, have not been taken into account adequately. As a consequence, the cities have had to channel a greater share of local revenues into capital outlay and debt service.

In a number of areas, more particularly described in the accompanying findings of fact, the enactment of State laws has imposed higher levels of noneducational spending. Some of these have special application to New York City while others affect the up-State cities.

The defendants did not present evidence contradicting the contention and proof of the intervenors that they had greater noneducational costs which diminished the extent of tax resources available to finance education. It was only the claim of the intervenors that such noneducational costs were inexorable that the defendants sought to disprove. The effort in that direction, however, was limited to evidence that audits by the office of the Comptroller of the State of New York had been critical of a portion of health and welfare expenditures in the City of New York. The defendants' witness, Netzer, while expressing the opinion that many of the cities' noneducational expenditures were not inexorable failed to undergird that opinion by showing how the cities could appreciably effect a reduction in those expenditures. Even that witness conceded that given a situation in which higher noneducational expenditures are unavoidable and the municipality's tax rate cannot be increased, the State aid system should give recognition to those realities. The evidence demonstrated that the cities in this case are proper candidates for such recognition. They were shown to have the highest tax rates in the State and imposed real property taxes at about the constitutional limit.

The intervenors have satisfactorily established by the evidence presented their contention that in measuring local funding ability, the State aid formula overstates the cities' capacity to finance their schools because it disregards the "municipal overburden" drain of noneducational services on the local tax dollar.

THE REDUCED PURCHASING POWER OF THE URBAN EDUCATION DOLLAR

[4] It is the contention of the intervenors that the State aid formula is seriously defective because of its failure to take into account the extent to which educational costs vary among the State's school districts. They assert that the aid formula, in effect, operates on the factually unsound assumption that the dollar has equal purchasing power for educational resources throughout the State. The intervenors presented evidence to demonstrate, contrary to the foregoing assumption, that educational costs were, in fact, generally higher in the down-State and metropolitan areas and also that certain other factors were the cause of higher educational costs in the State's largest cities.

Data compiled in a study made under the auspices of the

Education Committee of the New York Senate showed that the average expenditure per pupil for the State-mandated minimum education program among typical down-State districts was 47% higher than the average expenditure in up-State districts. The same study showed that the average expense among metropolitan area school districts was 29% higher than was the average expense level in rural districts. Those findings of higher costs in down-State and metropolitan areas were confirmed by cost-of-living data provided by the Bureau of Labor Statistics of the United States Department of Labor. Other evidence established that wages paid in private employment in New York City are higher than the wages paid elsewhere in the State.

Teacher salaries have constituted the largest component of school costs. In 1974-1975 the average classroom teacher's salary in the New York City metropolitan area was $16,498 while the average salary in the up-State area was $12,737, a difference of 30%. When salaries of teachers were examined according to degrees held and years of experience, the median salaries for teachers in down-State districts showed that such districts had to pay more than up-State districts to avail themselves of teachers with comparable qualifications.

Other factors have made it necessary for city school districts to pay higher salaries than in suburban and rural districts. The large urban school districts have had to pay more to maintain the level of teacher quality in the face of hiring competition from other school districts. Contributing to this have been such considerations as the need to teach large classes having a high percentage of disadvantaged pupils; the need to perform teaching assignments with inadequate materials and supplies in deteriorating buildings; and the anxiety produced by the violence and vandalism in many city schools.

When the perception of city schools as unattractive places in which to teach is combined with other higher cost factors found in the cities, the result has been that the urban dollar purchases less in educational resources. By failing to take into account this reduced purchasing power of the urban education dollar, the State aid formula has exaggerated the actual capacity of the cities to finance their schools from local revenues. No witness or exhibit was presented by the defendants to controvert the intervenors' claims of higher educational costs in the urban areas.

THE USE OF PUPIL ATTENDANCE AS A MEASUREMENT FOR STATE AID

[5] The intervenors challenge the fairness of the State aid formula because of its failure to recognize the financial impact of high pupil absenteeism in the large cities' schools. The formula at two different points in the calculation of State aid uses a pupil count computed on the basis of average daily attendance rather than on the basis of enrollment. Average daily attendance is first used as part of a measuring device to determine a district's ability to finance its schools. This is done by dividing the district's total real property valuation by the number of resident pupils in average daily attendance. The resulting figure from that computation shows the amount of real property value behind each pupil. High absenteeism in the cities' schools causes lower city school attendance rates. The lower attendance rates, in turn, inflate the assumed amount of real property wealth behind each pupil, thereby reducing the formula's operating expense aid for each aidable pupil unit. At another point in the calculations, the aidable pupil figure is multiplied by the district's weighted average daily attendance, rather than the district's enrollment, to determine the aggregate aid for the district.

The intervenors assert that the use of average daily attendance instead of average daily enrollment produces a diminished pupil count in the cities' schools which doubly reduces the amount of operating expense aid. They claim further that the resulting reduction in State aid is not only irrational but amounts to the imposition of a penalty on urban districts because of high rates of absenteeism which they cannot effectively control.

The evidence adduced by the intervenors showed high rates of student absenteeism to be a problem in large cities outside the State of New York. In New York State absenteeism was demonstrated to be substantially more of a problem in large city schools than elsewhere in the State. Average attendance rates in the five largest cities were approximately 84% in contrast to an average rate of 93.83% in the balance of the State. It was found to be particularly acute in the secondary schools.

At first glance it might be supposed that not having as many pupils actually present in school would mean a saving in money. The evidence, however, was that high rates of absenteeism not only do not result in any saving of money for

city districts, but actually increase their costs. The urban school districts must plan their operations and expenditures for the entire school population including those whose attendance becomes erratic or infrequent. In the cities of Buffalo, New York and Rochester, three to six times as much was spent in 1972-1973 for attendance services as was spent in other districts. In 1974-1975 Rochester had 13 times as many attendance officers per thousand pupils as did schools in the rest of Monroe County. Additional costs were generated by high absenteeism rates because of the need to provide programs for repetition and remediation to assist pupils whose learning progress was impaired by absence from classes.

As the findings of fact set forth in greater detail, the causes of high absenteeism in the large city school systems are traceable to poverty and its associated conditions. Some of the contributing conditions associated with poverty were shown to include higher incidence of illness among children from impoverished homes; lack of warm clothing in cold months; pupils kept at home to care for younger children in the family; lack of parental encouragement to attend school; impaired mental and emotional health; and lack of success in school.

The evidence presented by the intervenors showing that the high rates of absenteeism in city schools are causally linked to poverty and its associated problems affecting large numbers of pupils was not controverted. Some attempt was made to indicate that a more zealous enforcement of attendance would lessen the amount of absenteeism. But this was shown to be unrealistic in view of the limited resources the cities already had to devote to educational purposes. The dimension of the problem in New York City was graphically illustrated by evidence that in order for an attendance officer in the Borough of Manhattan to be the producing cause of additional State aid equal to his salary, he would have had to produce additional attendance of 58 pupils each day of the school year or 10,490 student days per year, an unattainable result in the light of poverty-related causes of absenteeism.

The use of average daily attendance as an appropriate measuring device was seen by two witnesses as providing a stimulus for high attendance rates. Beyond the expression of an opinion to that effect, neither witness supplied factual support for that view. The Regents of the University of the State of New York in November, 1976 recommended the use

of a pupil count based partly on average daily attendance and partly on enrollment ("Average Daily Membership") as a means of providing a more equitable count of pupils. It is also appropriate to note that certain of the witnesses called by the defendants were in agreement that a pupil count based solely on average daily attendance was not justified and ought to be changed.

The evidence supports the intervenors' claim that the State aid formula's use of pupil attendance instead of pupil enrollment as a measure for State aid overstates the cities' actual fiscal capacity and penalizes them for their high rates of absenteeism.

SMALLER STATE AID SUPPLEMENTS FOR SPECIAL NEED STUDENTS IN THE CITY SCHOOL DISTRICTS

[6] The State aid formula recognizes that pupils who are disadvantaged, handicapped or have other special needs require costly special services intended to cope with the difficulties such pupils encounter in acquiring their education. The formula implements that recognition by providing for extra weightings and special services and provisions applicable to those types of pupils. The intervenors contend, however, that such provisions actually discriminate against the large city districts in at least three respects with the result that the urban districts receive less extra aid than other districts for each special needs pupil despite the fact that the greatest concentration of special needs pupils is in the city districts.

The first respect in which the formula is claimed to discriminate against the city districts has to do with reduced extra aid for disadvantaged and nonseverely handicapped pupils in the city districts. Certain preliminary comments about "disadvantaged" pupils with special education needs are in order. The number of pupils with special educational needs (PSEN) is determined by annual Pupil Evaluation Program (PEP) tests given throughout the State in reading and mathematics to pupils in the third, sixth and ninth grades. These tests identify the proportion of pupils in each school district who score in the bottom three stanines or among the lowest 23% in the State. The evidence has shown that the four city districts who are among the plaintiffs-intervenors had 36% of the State's pupils enrolled in their schools. In 1974-1975, however, those same city districts had 52% of all the pupils with special educational needs attending their schools. New

York City itself had 47% of the State's pupils whose test scores placed them below minimum competence. In addition, the same four city school districts in 1974-1975 had 53% of the State's pupils with nonseverely handicapping conditions.

In computing the amount of additional aid to be given for those disadvantaged and handicapped pupils under the formula at issue in this case, a PSEN pupil is given an extra weight of .25 and a pupil with a handicapping condition is given an extra weight of 1.0. These weightings, however, are applied to the reduced aid per pupil unit which itself was arrived at by using a measure which overstated the cities' fiscal capacity to finance educational needs. That measure, as earlier discussed, by failing to give effect adequately to the factors of municipal overburden, reduced purchasing power of the urban education dollar and high absenteeism exaggerated the fiscal ability of the cities to finance their schools and thereby reduced basic operating aid per pupil. While the weightings furnished extra aid, the aid from such weightings has itself been reduced because the weightings have been integrated with a measure which has, at an earlier step of computation, treated the urban districts as less in need of aid than they actually were. The flawed result of a process intended to help meet the added costs of educating disadvantaged and nonseverely handicapped pupils has been, according to the evidence, to provide reduced and below-average assistance to the cities burdened with the greatest numbers and concentration of pupils in those categories.

CITY DISTRICTS AND THE AID FORMULA'S SECONDARY SCHOOLS WEIGHTING PROVISIONS

[7] The State aid law challenged in this litigation took into account the increased costs of providing education at the secondary school level. A study was carried out in 1976 by the New York State Senate Committee on Education of a random sample of 41 city, suburban and rural schools. The large cities that are parties in this case were not included because of the differences in their methods of local financing. The study found that average secondary school costs per pupil exceeded average primary school costs per pupil by approximately 30%. While the State aid formula made provision for extra aid for secondary school pupils by means of a secondary weighting of .25, it failed to make that weighting applicable to those

disadvantaged and handicapped students attending secondary schools.

It is the contention of the intervenors that in actual operation the secondary weighting discriminates against the large urban districts and they presented uncontroverted evidence that supports such claim. That evidence showed that educating disadvantaged and handicapped pupils at the secondary level entails the same extra costs that are involved in educating so-called "normal" pupils. The special problems that beset the disadvantaged and handicapped children superimpose extra costs for the services designed to overcome or alleviate their problems. In short, the fact that those pupils have progressed to the secondary level of their education does not eliminate the need for expensive special types of services. The formula's failure to allow the secondary weighting for disadvantaged and handicapped pupils had a markedly adverse effect on city school districts because they have been shown to have the highest concentration of such students at the secondary level. The result of excluding these categories of secondary school pupils from the secondary weighting provision of the formula was that only 46% of the five largest cities' secondary school pupils were eligible for the .25 secondary weighting. In sharp contrast, the evidence establishes that 79% of the secondary school pupils in the rest of the State were eligible for such weighting.

The failure to have the formula give adequate recognition to the proportions of disadvantaged and handicapped children in urban secondary schools resulted in the five largest city districts receiving only 18% of the total amount apportioned through the secondary weighting aspect of the formula in comparison to 30% of the State's total payable operating aid. Not only have the defendants not controverted the manner in which this aspect of the aid statute affects the urban districts, but one of their principal witnesses with concededly high knowledgeability in the field of school finance, concluded that the facts just summarized disclose that the secondary weighting provisions of the formula discriminate against the city districts.

REDUCTION IN AID FOR NONSEVERELY HANDICAPPED AND OCCUPATIONAL EDUCATION PUPILS CAUSED BY CITIES' INELIGIBILITY TO USE BOCES AID FORMULA

[8] New York has two separate aid systems for mildly

handicapped and occupational education pupils. All school districts outside the five largest cities are eligible to participate in BOCES (Board of Co-operative Educational Services). The five largest cities arrive at the amount of State aid for their mildly handicapped children by using a 2.0 weighting. That is, they receive twice as much aid for one of such pupils as for a normal pupil. The formula requires that a city first calculate its local share on the normal 15 mill basis (.015 × property tax base per RWADA). The figure resulting from that calculation is then subtracted from $1,200, thereby giving the amount of State aid for a "normal" pupil. That amount is then doubled to obtain the amount of State aid for each handicapped pupil. It must be noted that inherent in the foregoing computation is the element of determining aid by use of a mechanism which uses the amount of city property wealth behind each pupil. Just as such mechanism overstates the large cities' wealth for aid purposes generally, as earlier discussed, so is that effect perpetuated in calculating aid for the cities' handicapped pupils. It is thus seen that the large cities are aided in their expenses for these handicapped children only up to $2,400.

In contrast to that limit for the cities, school districts which participate in BOCES do not have a dollar ceiling on aidable expenditures. There are certain deductions that must be made to arrive at the district's figure of "approved expenditures." But except for those deductions, districts participating in BOCES receive State aid for allowable costs in any amount. Moreover, such districts may compute their share and the State's share of such allowable costs by the use of one of two options known as the "8 mill option" and the "aid ratio option."

Under the 8 mill option a district making a high tax effort is rewarded. The local district's share is calculated by use of the following formula:

$$\frac{.008}{\text{district tax rate}} \times \text{total allowable expenditures}$$

When this formula is used and the local district's share is determined the remainder of allowable costs is paid by the State. The higher the local tax rate, the smaller the fraction of expenditures to be borne by the district and the larger the State's share.

When the aid ratio option is used, the calculation of the State's share of allowable expenditures is made by the following formula: aid ratio × total allowable expenditures. The aid ratio is a percentage that expresses the relationship between the tax base per pupil of the particular school district and the average tax base per pupil for the entire State.

The extent of the advantage of the BOCES formula available to nonurban districts is thus measured by two facts, allowable costs for services to the mildly handicapped and the local district's tax rate. The more the allowable costs exceed $2,400 per pupil, the greater the advantage. The higher the tax rate the higher the aid per pupil because the BOCES formula rewards local school district tax efforts.

In addition, the noncity districts also have the option to use the extra weighting of 1.0 for their nonseverely handicapped pupils instead of the BOCES formula if that provides more aid.

The evidence demonstrated that if the intervenor districts were not excluded from aid under the BOCES formula they would have received substantially more State aid for their nonseverely handicapped pupils.

Noncity school districts participating in BOCES are entitled to use the same optional formulas in calculating State aid for their occupational education pupils as are used for the nonseverely handicapped. The large city school districts receive State aid for their occupational education students under what is known as "Special Services Aid." That aid was calculated according to the 1974 version of the formula by subtracting from $1,200 a local share of 15 mills times full valuation per RWADA. Evidence presented by the intervenors which compared what the cities received under the Special Services Aid Formula in 1974-1975 with what they would have received by use of the BOCES formula showed the cities received more than $15,000,000 less in aid under the Special Services Aid Formula.

In 1976 the Regents of the University of the State of New York in making their recommendations for legislation to the Governor and the Legislature reiterated their recognition of the inequity affecting the large cities by reason of their not having access to the more favorable BOCES formula.

As the findings of fact set forth, the intervenors have satisfactorily established by the evidence presented that the

intervening school districts have the highest concentration and numbers of pupils who are disadvantaged, handicapped or manifest special needs. Despite that fact, such districts have been shown to receive below average supplemental aid for those categories of pupils and that this is caused by the discriminatory features of the State aid formula discussed in the preceding segment of this decision.

Thus far, the discussion of plaintiffs-intervenors' case has centered on their claim that the equalization purpose of the aid statute has fallen short of achievement because in actual operation the aid formula treats the large urban school districts as having greater fiscal capacity to meet the costs of public education than is the fact. In short, the discussion thus far has related to the intervenors' claim and proof that the aid formula's failure to take into account specific burdens of the large cities and their school districts has resulted in less State aid in contravention of the aid statute's equalization purpose and constitutional requirement. Attention now shifts to another aspect of the intervenors' case which was identified during the trial as being the area of the "education overburdens" that affect the large urban school districts.

THE STATE AID FORMULA'S DISREGARD OF THE EDUCATION OVERBURDEN OF THE LARGE URBAN SCHOOL DISTRICTS AND THE EFFECT ON EDUCATIONAL ACHIEVEMENT

[9] At the core of this aspect of the intervenors' case is the contention succinctly stated during final argument, that the large cities of the State "have the most difficult and the most expensive school populations in the State to educate".

The asserted basis for that contention is that the extraordinary problems stemming from urban poverty and its associated ills in turn created an array of educational overburdens that the large cities have been unable to cope with by resort to their own fiscal resources and which are essentially disregarded by the State aid formula. Because of this the urban districts further contend that although they have the largest concentrations of disadvantaged children requiring compensatory education, they are unable to supply that help, thus resulting in a denial to those children of an equal educational opportunity.

In support of those contentions the intervenors undertook first to delineate the effect of poverty in the larger cities on public education. As shown in more detail in the findings of

fact, the cities have more poverty and more economically disadvantaged pupils than other areas of the State. Dependency on welfare in its various forms was shown to be a valid indicator not only of poverty itself but of the educational problems that are poverty-related. The evidence established that New York City, with 43% of the State's population, nevertheless had approximately three fifths of all the families in the State with a mother in the role of head-of-the-family and approximately two thirds of all the persons in the State receiving assistance from the program known as Aid to Families with Dependent Children (AFDC). The evidence also demonstrated that between 1960 and 1970 the number of families in New York City headed by a mother alone increased by approximately 81%. Between December, 1965 and June, 1975, the number of New York City children receiving aid for dependent children doubled, rising from 315,306 to 649,347. In up-State Rochester 42.5% of that city's elementary school pupils were found economically disadvantaged. The standard for eligibility under title 1 of the Federal Elementary and Secondary Education Act indicated another measure of poverty affecting New York City's school children. That standard employs welfare status and family income. With 31% of the public school enrollment in the entire State, New York City had at least 65% and, according to one of the defendants' witnesses, perhaps as much as 80% of all the pupils in the State eligible for title 1 assistance.

Buffalo, Rochester and Syracuse had among the highest proportion of children from low-income families and homes receiving Aid to Families with Dependent Children. Limited family income made about half of the school children of New York City and Syracuse and more than two thirds of the children in Buffalo eligible for free school lunches.

The effects of poverty and the conditions associated with it on school children in the large city districts were charted with evidence both extensive and intensive in its scope. The enormous amount of evidence bearing upon the education overburden of the large cities was organized into eight separate categories. The findings of fact treat each such category and the elements within it. Here, it is deemed sufficient to address them in more summary fashion.

IMPAIRED LEARNING READINESS

Urban poverty generates a variety of living conditions

which prevent many children in large cities from being ready for school when they enter. As compared to children of the same age from middle-class families, many of the urban children have not been exposed to the benefits that flow from such things as adequate housing, proper food, adequate parental supervision and preschool experiences leading to learning readiness. Lack of learning readiness requires special assistance if a child is to acquire an adequate education. Compensatory education programs designed to overcome lack of learning readiness are expensive and the larger city school districts were shown to lack the local resources to supply the assistance for the extremely large numbers of children who needed early help. Failure to furnish such help at the early stage of the child's educational career creates the likelihood that such child will fail to attain adequate levels of achievement and that learning problems will become worse as the child moves ahead to higher grades in the city schools.

IMPAIRED LEARNING PROGRESS

The same conditions associated with poverty that caused many city children to begin school with a deficit in learning readiness continue to exist for such children as they move along in the school system. The evidence has established that needed compensatory education was unavailable to many children. But it has also shown that even when it has been possible to provide compensatory education to certain of the city pupils, the poverty-related conditions of life that were responsible for the learning readiness deficiency still remain and represent impediments to academic progress and achievement. The findings of fact contain a listing of poverty-related conditions that impede the progress of pupils in large city schools. Only a few need be mentioned here. Lack of proper food, clothing, medical care, as well as proper recreation interfere with educational progress. Overcrowded and noisy living quarters interfere with a child's study. Frequent moving of the family from one place to another causes interruptions in the progress of school work and has an adverse effect on achievement. Not infrequently urban children have been shown to engage in part-time work which not only leaves less time for school work, but drains their energy leaving them tired and lacking in energy when attending school. These conditions, in combination with others detailed in the findings of fact, produce a cluster of adverse effects upon children's

work in school, that include distraction from school work, undone homework, disruption of the progress of learning in a sequential manner and lack of motivation to attend school and to achieve.

Measures to counteract and overcome the adverse effects of poverty-related conditions on great numbers of city school children require funds beyond those allocated for regular educational programs. The cities, with their reduced State aid, have been unable to finance the compensatory education programs to offset the burdens brought to school by children living in poverty conditions.

IMPAIRED MENTAL AND EMOTIONAL HEALTH

The large cities are burdened with disproportionate numbers of pupils with mental and emotional problems. Here again, conditions of life in urban poverty were shown to be principal contributing factors. The findings of fact list specific causes and factors as well as the effects they have on mental and emotional health of city school children.

The educational problems that flow from impaired mental and emotional health were shown to be susceptible to remediation. Successful programs for that purpose require extra funds and personnel. The cities, with their reduced aid and fiscal constraints, have been forced to cut back or eliminate the programs and personnel that are needed to cope with such problems. Reductions in staff have caused unmanageable case loads for the staff members remaining. As a result the school problems associated with impaired mental and emotional health have continued.

IMPAIRED PHYSICAL HEALTH

The large cities were shown to have a substantial overburden of pupils with impaired physical health. This overburden, like those already discussed, has been shown to be rooted in the poverty conditions in which such a high percentage of the children live. The findings of fact recite not only the greater incidence of health problems among poor children, but also the disproportionate prevalence of specific types of health problems among them. The evidence has shown that children living in urban poverty generally receive inferior medical care and the findings of fact set forth reasons why that has been found to be the case.

The evidence has confirmed what common sense would predict, namely, that the combination of greater prevalence of health problems and lack of good medical care would result in absences from school and impairment of performance in the classroom.

Measures aimed at preventing or remedying health problems in many cases call for trained health personnel in adequate numbers to provide health education, identification of health problems, notification of parents and arranging for appropriate remedial treatment. Providing such services was shown to be more costly in the large cities. With their reduced school aid and local fiscal constraints, the cities have not been able to provide the level of health services needed by their pupils.

HANDICAPPED CHILDREN

The greater number of handicapped pupils found in the large cities is another severe overburden for their educational system. The large cities in 1974-1975 had more than their share of handicapped pupils, as was shown by a comparison with their suburban areas. In recent years there have been marked increases in children with handicapping conditions in those cities. The increase in the numbers of handicapped pupils paralleled the increase in the number of pupils from poverty homes. Combinations of handicaps (such as deafness and severe emotional disturbance accompanied by speech and language handicaps) frequently exacerbate the problem of educating children. In addition to the categories of handicapping conditions recognized by State law, there were shown to exist substantial numbers of pupils whose learning progress was impeded by "learning disabilities." These are inabilities caused by minimal brain dysfunctions and manifested in an inability to receive, organize or express information normally. It was estimated that 10% to 30% of New York City's school children are afflicted with learning disabilities.

The evidence proved that it is expensive to provide the testing and evaluation of handicapped children and to furnish the type of instruction and therapy their conditions require. The large cities, because of their reduced fiscal capacity and reduced State aid, are unable to provide the services needed to test, evaluate, treat and instruct all of their handicapped children. Fiscal constraints have compelled the large cities to cut back substantially on their mental health and special

education staffs. As a consequence, pupils in need of special help failed to receive appropriate instruction and treatment.

FOREIGN LANGUAGE CHILDREN

The report of the Fleischmann Commission estimated that in 1970 there were 100,000 pupils in New York State's public schools with significant handicaps with the English language and that 85% of those pupils were in New York City. Tests given in 1975 and 1976 to foreign language-speaking pupils in New York City showed that from 100,000 to 110,000 were unable to participate effectively in English. While this is predominantly a problem affecting New York City because of its status as a major port of entry, the evidence showed that the up-State cities are faced with the problem to a disproportionate extent. The three up-State cities, together with the city of Yonkers had 7% of the State's total enrollment outside New York City in 1974-1975, but they had 13% of the American Indian and Asian pupils and 21% of the Spanish surnamed pupils.

In New York City the pupils lacking facility in English are not only numerous but they reflect diversity of national origin and language. Between 30 and 40 different foreign languages were shown to be represented. The problem of non-English-speaking pupils is made more difficult by the shifting composition of the foreign language population as new groups arrive from different foreign areas.

The evidence showed that among the body of immigrant children, there were substantial numbers who not only were nonspeakers of English, but who were also illiterate in their native language.

The presence of such substantial numbers of non-English-speaking pupils has been shown to constitute another educational overburden for the large cities. Under both Federal regulations and court decisions school authorities have been required to make their instructional programs meaningfully available to such pupils. The implementation of those mandates requires special expenditures beyond those required for the ordinary English program. Those extra expenditures stem from the need to recruit bilingual personnel, training existing personnel and developing instructional materials for use at various grade levels in several languages. Additional expenditures also flow from the need to provide bilingual personnel and materials for programs such as special education, occupa-

tional education and for supportive services such as guidance counselors and social workers. In addition, because the development of a facility in English calls for individual and small group instruction, there is a need for more teaching personnel to achieve more small pupil-teacher ratios thereby adding to the costs of meeting this problem.

The large cities have not been able with their restricted local resources and reduced State aid to develop adequately the English language facility of the large numbers of pupils who speak and read little or no English. As a result, many foreign language pupils have not acquired a facility with English and have performed poorly in their school work.

OCCUPATIONAL EDUCATION STUDENTS

To the other educational overburdens affecting the large city school districts must be added that of the high concentration of occupational education pupils.

In the three up-State cities the enrollment of high school pupils in occupational education in 1974-1975 ran from two to three times greater than in schools located in adjacent suburbs. In the same period New York City had nearly 30,000 high school pupils enrolled in occupational programs which was a higher proportion than was the case in nearby counties.

The need for occupational education was shown to be greater in the large city school districts. More city pupils entered trades and fewer continue on with higher education. When it is available, occupational education has been shown to be a highly effective program. Pupils are motivated to attend school and to achieve learning skills both in occupational training and in the academic area as well.

The costs of providing occupational education constitute an overburden for the large city school districts because they are so much greater per pupil than the costs of providing an academic education. The reasons for such costliness are set forth in the accompanying findings of fact.

The large city school districts, because of their own limited resources and reduced State aid, have been unable to provide occupational education for all the pupils who want it.

STUDENT ABSENTEEISM

The high rates of absenteeism in large city school districts have earlier been discussed in the context of the failure of the

State aid formula to take that urban reality into account in measuring fiscal capacity and in arriving at a pupil count for distribution of State aid. The causes of high absenteeism have also been treated in that earlier segment of this decision and in related findings of fact thereby making it unnecessary to repeat them at this point. Absenteeism constitutes a substantial overburden for the large city school districts because of certain effects that flow from it. These include the need to have larger numbers of attendance officers thereby increasing costs; the necessity for teachers to give remedial assistance to absentees when they return in addition to regular ongoing work with those who are in regular attendance; and low achievement levels and failure of pupils attending on an irregular basis often leading to many finally dropping out of school entirely.

Some measure of improvement in attendance in urban school districts can be achieved, but the cost of such improvement is high. Evidence was presented that pupils were motivated to attend school when programs were offered which met their interests and needs such as occupational education, bilingual education and other specially structured programs. Improvement can be achieved if support services are available at a level sufficient to cope with the underlying causes of absenteeism.

While it is possible to manage the problem of absenteeism, the large city school districts with limited local resources and State aid are unable to bring to bear the types of measures that would relieve the burdens of absenteeism and the educational damage that is caused by it.

INADEQUATE RESOURCES TO MEET EDUCATION OVERBURDENS AND THE EFFECT ON PUPIL ACHIEVEMENT

The inability of the large city school districts to cope with the several categories of the educational overburdens has had effects on a great number of pupils that are both serious and tragic. National achievement tests given in large city school districts produced scores showing that substantial numbers of pupils had not acquired even basic minimal educational skills. The failure to acquire such basic skills in lower grades cannot be overcome in high school because of lack of resources at that level. Even if they do not drop out of school, as many do, substantial numbers of pupils remain seriously restricted in their learning as demonstrated on the State's Pupil Evalua-

tion Program (PEP) tests which measure on a State-wide basis the proficiency in reading and mathematics of children in the third, sixth and ninth grades. Pupils scoring below minimum competency are thus identified as "Pupils with Special Educational Needs" (PSEN). The four cities involved in this litigation had far larger percentages of pupils scoring below minimum competency than other areas in 1973. The average percentage of PSEN pupils in the four cities ranged from 25% to 35% higher than in the rest of the State. The percentage of pupils scoring below minimum competency was shown to become greater and the gap between the cities and the rest of the State widened as the pupils went ahead to upper grades. More recent PEP scores indicated the same concentrations of city pupils scoring below minimum competency. These results found confirmation on nationally normed tests.

Severe education underachievement and failure were shown to be compounded as the pupil moved along grade by grade. The later portions of the school curriculum assume that the pupil possesses skills that were acquired at an earlier stage of his educational experiences. If those skills have not been acquired, then the pupil is not equipped to benefit from the educational content of the later offerings.

Effective programs to remedy or alleviate the problems of severe underachievement and failure cost much more money per pupil than the regular educational program because they require substantial numbers of additional personnel. The large urban school districts with limited local resources and reduced State aid are unable to bring effective remedial education to all their underachieving and failing pupils. The evidence has shown that the situation has been worsened by cutbacks caused by local fiscal constraints and diminished Federal funds under title 1 of the Elementary and Secondary Education Act.

THE EFFECT ON EDUCATION AS A WHOLE IN THE LARGE URBAN DISTRICTS OF STATE AID FROM A DISTORTED FORMULA

The intervenors assert that as a result of the State aid formula's failure to grant them assistance commensurate with their reduced local capacity to finance education and the special overburdens under which they labor all school children in the cities are short-changed. When the cities concentrate resources on pupils with special needs, other pupils, including those who are in fact disadvantaged but not reached by

special programs, are subjected to educational deprivation. As concerns educational offerings the city schools have been shown to have among the highest teacher-pupil ratios in the State and a severely constricted variety of elective courses. Many pupils attend classes in buildings which were shown to be in need of repairs and lacking in facilities for counseling, study or recreation. Pupils attending schools in the large cities were shown to be provided with less physical security in their schools; less transportation; restricted sports and extracurricular activity; inadequate library and health services and diminished offerings in art and music. In summary, the failure to provide State aid on an equitable basis deprived the children in the large city districts of an equal education opportunity.

CONCLUSIONS—ORIGINAL PLAINTIFFS' CASE

FEDERAL EQUAL PROTECTION CLAUSE

[10] In the discussion of the original plaintiffs' case reference was earlier made to the fact that on the defendants' motion for summary judgment the original plaintiffs took the position that they were not pressing this claim of a violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution, but did reserve the right to reassert the claim in the event the United States Supreme Court altered the position taken in the case of *San Antonio School Dist. v Rodriguez* (411 US 1).

In *Rodriguez* the Supreme Court refused to find that the Texas school finance system violated the Federal equal protection clause. Subsequent challenges to school finance systems insofar as they have been based on claims of unconstitutionality under the Federal Constitution similar to that of these plaintiffs have been rejected on the authority of the decision in *Rodriguez*. (*Robinson v Cahill*, 62 NJ 473, cert den *sub nom. Dickey v Robinson*, 414 US 976; *Serrano v Priest*, 18 Cal 3d 728; *Horton v Meskill*, 172 Conn 615, 376 A2d 359.) Accordingly, the claim of the original plaintiffs of unconstitutionality, to the extent that it has been made on Federal grounds, is rejected.

STATE EQUAL PROTECTION CLAUSE

There is treated next the claim of the original plaintiffs that New York's school finance system, as to them, violates principles of equal protection of the law under the New York State Constitution (art I, § 11). Selection of a proper standard of

review for equal protection analysis is considered first. Three possible standards are urged as appropriate by the original plaintiffs. The first of these is commonly referred to as "the strict scrutiny" standard. This standard of review is appropriately utilized when the alleged discrimination is based on a "suspect category" such as race or gender or when the alleged discrimination impinges on a constitutionally protected "fundamental interest". The original plaintiffs argue that both these elements are present here and that the strict scrutiny standard is the proper one to be used.

In carrying out its constitutional obligation to provide for the maintenance and support of a system of free public schools, the State long ago elected to delegate a portion of its obligation to local districts who were empowered to generate funds by local real property taxes. As the evidence has shown, the capabilities of districts to raise tax moneys have been influenced by the size of the tax base available for the imposition of tax levies. The development of State aid to public education was made necessary to compensate for the variances among districts in their capacity to provide educational financing. The system for providing funds to finance public education is thus made up of a local component and a State-furnished component. The creation of school districts to aid the State in discharging its obligation was certainly a legitimate option open to the Legislature, and this appears to be recognized by the original plaintiffs. Implicit in the long history of State aid to education has been the State's recognition that additional financing over and above that generated by local tax revenues was needed in order for the State to discharge its constitutional obligation. It is the end product which has emerged from use of several methods selected by the State to finance public education that is being examined for constitutional compliance. To isolate the division of the State into school districts possessing varying amounts of property wealth and from that circumstance find an impermissible classification according to wealth is not warranted. (See *Robinson v Cahill*, 62 NJ 473, 492, *supra*.)

The strict scrutiny standard may be applied if the right to education is a fundamental right entitled to special constitutional protection, in which event the alleged statutory discrimination is examined to determine whether it is required by a compelling State interest. For Federal equal protection purposes education is not a fundamental right. (*San Antonio*

School Dist. v Rodriguez, 411 US 1, *supra*.) The question then is whether education has a different status for purposes of State equal protection analysis and review. Unlike the situation in *Rodriguez*, where the court found that education was nowhere mentioned in the Federal Constitution, the education article of New York's Constitution specifically guarantees a free education to all the State's children. The historical development of State aid to education in New York, which has already been traced both before and after the adoption of an education clause as part of the State's Constitution in 1894, renders difficult any conclusion other than that education is an interest of great State importance. The evidence in this case has shown education to be the single largest activity in which State government engages. Nevertheless, whether education is in New York such a fundamental interest as to invoke special constitutional protection has been called in question by language appearing in *Matter of Levy* (38 NY2d 653, 658) where it was stated: "Nor is the right to education such a 'fundamental constitutional right' as to be entitled to special constitutional protection (*San Antonio School Dist. v Rodriguez*, 411 US 1, 16)." The defendants argue that *Matter of Levy* precludes use of the strict scrutiny standard of review because education is not a fundamental interest. The original plaintiffs, while conceding that the language employed in *Matter of Levy* can be read as supporting defendants' position, urge that the statement should be regarded as dictum because, they assert, the right to education was not at issue in that case. This court is not persuaded that *Matter of Levy* can be distinguished on that ground. It is true, as the original plaintiffs have pointed out, that the Attorney-General's brief in *Matter of Levy* contained references to the effect that when the Legislature enacted special provisions for the education and maintenance of blind and deaf children, it did so as "an act of public charity" permitted by the provisions of section 8 of article VII of the State Constitution, rather than in fulfillment of the State's obligation to educate its children (art XI, § 1). The fact remains, however, that *Matter of Levy* concerned the right to education. The court recognized (p 657) that a "handicapped child has a right to a free education in the State of New York" under the education clause of the State Constitution. The issue confronting the court was the constitutionality of legislative enactments which, on the one hand, provided *wholly* free education (including all maintenance expense) for blind and deaf children, while at the same

time providing free education to other handicapped children *except* for maintenance costs to which parents could be ordered to contribute. The statutory differentiation was challenged as a denial of equal protection of the law under both Federal and State constitutional provisions. To the extent that the case concerned alleged unconstitutional discrimination caused by statutory classifications for purposes of determining whether a handicapped child received a wholly free education or something less than a wholly free education, it may be regarded as an education case and not merely one dealing with the maintenance component of education. It is believed that it was in the context of a handicapped child's right to education that the court approached the selection of an appropriate standard of equal protection review and made its comment that "the right to education" was not such a fundamental constitutional right as to be entitled to special constitutional protection. Having already ruled out handicapped children as a "suspect classification" the court found that the strict scrutiny test was not the appropriate standard of review and applied the rational basis test under which it found no constitutionally impermissible classification.

This court regards *Matter of Levy* as authority for the position that the right to education is not such a fundamental constitutional right as to invoke special constitutional protection by use of the strict scrutiny standard of equal protection review.

[11] A second standard of review which has received judicial approval for use under appropriate circumstances is the so-called "sliding scale" test which lies somewhere between the strict scrutiny standard at one extreme and the rational basis test at the other. (Cf. *Montgomery v Daniels*, 38 NY2d 41, 61.) That this is a proper test has been established in *Alevy v Downstate Med. Center* (39 NY2d 326). As explained in *Alevy* (p 336), the first step in the sliding scale analysis is to determine whether the challenged discrimination "satisfies a substantial State interest." The discriminatory treatment must be examined to see whether it has a "substantial basis in actuality, and is not merely conjectural." The statutory scheme alleged to be discriminatory must at least "further some legitimate articulated governmental purpose." If it is found that a substantial State interest is served by the discriminatory scheme, a "further inquiry must be made as to

whether the objectives being advanced by the policy could not be achieved by a less objectionable alternative".

[12] The State interest or interests which the statutory plan is designed to satisfy must first be identified. The overarching interest here is the State's obligation to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const, art XI, § 1.) This encompasses the further State interest of affording all school children of the State equal educational opportunities in the elementary and secondary schools. State aid legislation is intended to serve the additional purpose of remedying inequalities in such educational opportunities that would exist because of lack of local resources unless the State furnished financial assistance.

The statutory plan for providing State aid has been shown by the evidence to operate unequally and to have a discriminatory impact on clearly identifiable segments of the pupil population of the State. Real property taxes levied by independent school districts provide about 60% of the funds needed to support their schools. The remaining 40% is money generated by State appropriations under the State aid formula and under a variety of categorical programs. The more than 700 school districts throughout the State vary greatly in the amounts of real property wealth located within their boundaries and serving as the base for school tax levies. It is the full value of real property per resident pupil in weighted average daily attendance which the State aid formula uses as the measuring device to determine school district wealth and fiscal capacity for all major components of State aid except that of transportation. Under all major State aid formulas, funds are apportioned among school districts on the basis of relative real property wealth.

The markedly unequal distribution of real property value among the State's school districts means a correspondingly unequal access to taxable real property wealth. This, in turn, means that the imposition of any given tax rate to such widely differing tax basis necessarily yields disparate revenues per pupil.

The evidence has demonstrated a wide variation in operating expenditures among the State's school districts. The original plaintiffs presented evidence showing a strong relationship between the disparities in the distribution of taxable real property wealth and the disparate levels of local expenditures.

This strong connection between the patterns of real property wealth and expenditures was not controverted by the defendants. The connection between district wealth and district expenditures is not fortuitous or coincidental. It is the nature of the State aid formula itself which makes it highly probable that districts with greater property wealth will spend more per pupil than their poorer counterparts. The built-in factor that causes this probability is the express linkage of district property wealth and district spending in the statutory formula. Specifically, the formula assumes a hypothetical spending norm of $1,200 per pupil and provides State aid to districts to raise the funds necessary to reach that spending level provided the districts levy the same 15 mill tax. Thus, wealthier districts have been able to raise substantially more than $1,200 by imposing tax rates lower than 15 mills. But, districts relatively poor in property wealth, though imposing sharply higher tax rates, have not been able to achieve the spending levels of the wealthier districts or even average levels of spending. In earlier portions of this decision and the accompanying findings of fact, note has been taken of the significant consequences that flow from the inability of property-poor districts to attain the spending levels of property-rich districts. They include differences in tax burden, professional staff ratios, class size, curriculum offerings, teacher characteristics, services available to pupils and the availability of equipment and supplies.

The evidence has shown that the State aid formula operates in a way that discriminates against components of the class of persons affected by the State aid system. That being so, it is necessary to inquire whether the objectives and purposes underlying the State aid system can be achieved by a less objectionable alternative (*Alevy v Downstate Med. Center*, 39 NY2d 326, 336, *supra*).

Since the decision in *Rodriguez*, there has been a significant advance in the development of revised methods of funding public education. (See *Horton v Meskill*, 172 Conn 615, 642, n 12, *supra*.) In the case last cited the court noted that since 1973 the Legislatures of 19 States had enacted educational finance reforms. The development and use of revised methods of educational finance were described by several witnesses during the trial. Not only have those witnesses testified to the availability of alternative techniques considered by them as susceptible to being fashioned to suit

the needs of New York's educational system, but evidence was also presented that alternatives to the present system have been studied and analyzed by special committees, task forces, the Regents of the University of the State of New York, and various consultants who have made specific proposals for change in the challenged system so as to lessen the present inequities.

It is not the desire or intent of the court to express an opinion about the suitability, desirability or the constitutionality of any of the various techniques concerning which evidence was adduced at the trial. Mention of their existence is made solely for the purpose of indicating that there exists a body of knowledge that is available for consideration by the Legislature concerning methods different from what is currently employed, leaving to that body the determination of what best suits the needs of New York.

This court concludes that measured by the standards of the so-called sliding scale approach, New York's current system of providing State aid to public elementary and secondary education denies the original plaintiffs equal protection of the law under the provisions of section 11 of article I of the New York State Constitution.

[13] The defendants take the position that for purposes of equal protection analysis, the proper standard of review is the so-called rational basis test. The claim of impermissible discrimination is next reviewed according to that standard. When the rational basis test is used, it must be shown that the alleged discrimination is justified because it is rationally calculated to further legitimate objectives *(Matter of Patricia A.*, 31 NY2d 83, 88). The test was succinctly described by then Chief Judge FULD in *Matter of Patricia A.* (p 88, *supra)* as follows: "Discrimination by the State between different classes of citizens must, at the very least, 'have some relevance to the purpose for which the classification is made.' *(Baxtrom v. Herold,* 383 U.S. 107, 111; see, also, *Stanley v. Illinois,* 405 U.S. 645; *Eisenstadt v. Baird,* 405 U.S. 438; *Reed v. Reed,* 404 U.S. 71, 76; *Matter of Jesmer v. Dundon,* 29 N Y 2d 5, 9; *Seidenberg v. McSorley's Old Ale House,* 308 F. Supp. 1253; *Sail'er Inn v. Kirby,* 5 Cal. 3d 1; *Matter of Louise B.,* 68 Misc 2d 95). Phrased somewhat differently, the classification ' "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

stanced shall be treated alike." ' (*Reed v. Reed*, 404 U.S. 71, 76, *supra.*)" The question then is whether the disparate treatment of school districts (and consequently the pupils therein) under the challenged legislation is warranted because such treatment bears a reasonable relation to the achievement of legitimate objectives.

Earlier, in discussing the purpose of the State aid system, it was noted that the objective is that of providing a method of remedying inequalities in the right to educational opportunities which would exist in the absence of intervention by means of State aid. The lack of rationality in the present system is delineated in the findings of fact and needs only summary comment here.

The State provides elementary and secondary education by means of schools in the more than 700 school districts. Their boundaries are today arbitrarily defined, even though in years past there may well have been good reasons for their establishment. Wide variations in taxable real property wealth are found among the districts. School taxes locally levied upon those disparate tax bases are the principal source of funds to finance operation of the district schools. The same real property bases are subject to taxes levied by other governmental units to finance their needs. School districts, such as those included among the original plaintiffs, despite high taxes levied on their lower-valued tax bases are unable to achieve the levels of educational expenditures attained by school districts with higher-valued tax bases through the levy of lower taxes. The availability of greater local revenues with less tax effort in districts with greater property wealth, plus additional funds from State aid, enables them to provide their pupils with meaningful educational opportunities not realistically available to pupils in districts with lesser property wealth.

While the intent and purpose of State aid is to correct and overcome such inequities, the operative effect of the challenged State aid formula has been to perpetuate them. That effect has been shown by the evidence to be produced by several factors. One of these is the use of a complex formula which in its application is made to operate as a function of the property wealth of the school districts. An additional factor is the continued distribution of flat grants, even to school districts having the greatest property wealth. A third factor operating to negate the purpose of correcting inequities in the

blanket use of so-called "save-harmless" provisions in the statutory scheme which render inoperative details of the State plan.

A rational basis for discriminatory treatment is not established, as the defendants have sought to do, by isolating components of the State aid scheme and urging that individually they bear a substantial relation to the statutory purpose. It is the totality of the formula and its operative effect that have been challenged rather than the rationality of any discrete element. The evidence amply supports the conclusion that the plenary operation of the State aid formula does not bear a rational relation to the objectives for which it was devised. It is the irrationality of the manner in which the State aid system actually operates that causes it to fail the rational basis test for compliance with equal protection requirements of the State Constitution.

THE EDUCATION ARTICLE

[14] Section 1 of article XI of the New York Constitution provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated". The original plaintiffs claim that the State has failed to meet its obligation under the foregoing provision.

The education article imposes on the State the obligation to assure to each school child an educational program that is appropriate to that child's need (see *Matter of Downey*, 72 Misc 2d 772; cf. *Matter of Levy*, 38 NY2d 653, 657-658, *supra*). The primary obligation to establish and maintain a system of free public schools is that of the State (see 3 Lincoln, Constitutional History of New York, p 554). In discharging that obligation it lies within the prerogatives of the Legislature to select a method suitable to achieve the constitutional objective. For that reason this court does not accept the claim seemingly made by the original plaintiffs that the delegation of responsibility to school districts to generate a substantial portion of educational funds from their own resources constitutes "an abdication of responsibility." Such a position inaccurately describes the real issue. Indeed, the original plaintiffs appear to recognize this in their "Post-Trial Memorandum of Law" where it is stated: "Whether the legislature chooses to run a centrally managed system out of Albany, or to delegate responsibility to artificially created school districts well may

be a permissible option. What cannot be delegated by the legislature, however, is responsibility for the end product." The Supreme Court of New Jersey in construing that State's constitutional provision for free schools, one which is similar but not identical to New York's, described the State's obligation in these terms: "The obligation being the State's to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation." (*Robinson v Cahill*, 62 NJ 473, 509, *supra.*) With further reference to the scope of the obligation, the New Jersey Supreme Court stated (p 513): "Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation."

In light of the foregoing it is seen that it is not the fact that, in attempting to fulfill the constitutional obligation, the State has delegated taxing responsibility to school districts which offends the education article. Rather, it is the fact that such delegation has been made without adequate recognition of the varying capabilities of districts to raise educational funds through taxes levied on disparate real property tax bases and the failure of the State to correct disparities in the availability of locally raised educational funds by providing State aid sufficient to discharge its primary obligation.

The manner in which the challenged system has been shown to operate has been summarized in previous portions of this decision and described in detail in the findings of fact. It would serve no useful purpose to repeat such matter here. It is sufficient to state that on the evidence adduced, the manner in which the State has been shown to provide funds for the "maintenance and support of a system of free common schools" fails to meet the obligation imposed by section 1 of article XI of the New York Constitution.

The court emphasizes that in so concluding, it is not to be understood as having labelled as constitutionally impermissible the State's use of local school districts in providing a

system of free public schools. Nor is the court to be understood as ruling that the use of locally imposed real property taxes is constitutionally unacceptable.

CONCLUSIONS—PLAINTIFFS-INTERVENORS' CASE

EQUAL PROTECTION OF THE LAW

[15] The plaintiffs-intervenors claim that the State aid formula denies them equal protection of the law in violation of section 11 of article I of the New York Constitution. The principle of equal protection of the law does not prohibit the State from treating different classes of persons in different ways. Statutory classification for purposes of according different treatment, however, must rest upon a reasonable rather than an arbitrary basis and be founded upon a difference that bears a fair and substantial relation to the purpose of the statute in order that all persons who are similarly situated are treated in the same way *(Matter of Patricia A.*, 31 NY2d 83, 88, *supra)*.

[16] A major purpose underlying State aid for public education in New York, historically and under the 1974 statute here challenged, has been that of equalizing the varying capabilities of the State's school districts to finance public education. That purpose in turn, serves the objective of providing equal educational opportunity for all the school children of the State.

The State aid statute purports to equalize the disparate fiscal capabilities of the State's numerous school districts, including those located in large cities. It has been formulated in such a way, however, that when applied to the large city school districts, their capacity to finance public education with local resources has been overstated. This distortion is caused by applying to the large city school districts the same yardstick of fiscal capacity as is applied to nonurban school districts without giving adequate effect to certain overburdening conditions that affect the large cities and the schools located within their boundaries. By the use of a flawed measure of fiscal capacity, the large cities are made to appear as possessing greater capability to finance their schools than is actually the case. Having been shown by the measurements of a flawed formula to be less in need of financial help, the large city school districts receive less State aid.

The plaintiffs-intervenors have established by evidence that

has not been contradicted that the large cities labor under the following major school finance overburdens:

The drain on large city tax dollars caused by the need to provide an enormous amount of noneducational services; the diminished value of the dollar allocated to city school purposes; the increased school costs caused by the far higher rates of student absenteeism prevailing in large city schools; and the increased costs caused by the far greater concentrations and numbers of disadvantaged, handicapped and other students with special needs. While the State aid statute on its face purports to accord equal treatment to all school districts, its failure to give effect to the overburdening factors affecting large city school districts has resulted in overstating the capacity of such districts to finance public education and thereby classifying them as less deserving of State aid. Such a classification bears no reasonable relation to the statute's purpose of providing State aid to districts in proportion to their need. Because the State aid statute has been shown to operate in that way, it has in its operational effect created a classification which as to the plaintiffs-intervenors lacks a rational basis and is discriminatory. It must be found therefore to constitute a denial of equal protection of the law and a violation of section 11 of article I of the New York Constitution.

[17, 18] The plaintiffs-intervenors have also based the claim of denial of equal protection of the law on the provisions of the Fourteenth Amendment of the Federal Constitution. In the case of *San Antonio School Dist. v Rodriguez* (411 US 1, *supra*), the Supreme Court upheld the constitutionality of the Texas school finance system. In doing so, it considered the claim that the finance system violated the Federal equal protection clause and rejected it after applying the "rational basis" as the standard for equal protection review. The question that must be resolved is whether the decision in *Rodriguez* has foreclosed a claim by plaintiffs-intervenors for denial of equal protection under the Fourteenth Amendment. It is important to note that the equal protection coverage afforded by the State equal protection clause has been construed as being the same as that under the Federal equal protection clause. (*Dorsey v Stuyvesant Town Corp.*, 299 NY 512, cert den 339 US 981.) The Federal equal protection clause, like its New York counterpart, permits the State to legislate different kinds of treatment to different classes of persons provided that

the classification is not arbitrary but made on a reasonable basis so that all those in similar circumstances are treated alike. (*Reed v Reed*, 404 US 71, 76.) A State statute may not prescribe different treatment for persons it places in different classes on the basis of criteria that are unrelated to the purpose sought to be achieved by such statute (*Reed v Reed*, pp 75-76, *supra*; *Johnson v Robison*, 415 US 361, 374-375). The breadth of equal protection coverage being the same under State and Federal equal protection clauses, it follows that a finding that the statute in this case denies equal protection to the plaintiffs-intervenors under the State Constitution should require a like finding under the Federal Constitution unless barred by the decision in *Rodriguez*. In this court's view, *Rodriguez* does not bar such a finding. What was decided in *Rodriguez* was that on the facts presented and using a rational basis standard of Federal equal protection review, the Texas school finance system did not deny the plaintiffs equal protection of the law under the Fourteenth Amendment. It is true that in determining what was the appropriate standard of review for equal protection analysis, the majority rejected the strict scrutiny test upon the ground that "wealth" was not a suspect category and that education was not a fundamental interest protected by the Federal Constitution. The fact that the court refused to apply the strict scrutiny test in *Rodriguez* does not mean that an educational statute's compliance with the Federal equal protection standards cannot be tested by a less rigorous standard of review. That is precisely what was done in *Rodriguez*. A similar course was followed by the Court of Appeals in *Matter of Levy* (38 NY2d 653, *supra*). In that case the court was called upon to determine whether section 234 of the Family Court Act violated the Federal and State equal protection clauses by authorizing the New York City Family Court to require parents of handicapped children, other than children who are blind or deaf, to contribute to the maintenance of such children in connection with their education. The court, citing the education clause of the New York Constitution, the Education Law and decisional precedent, held (p 657) that "a handicapped child has a right to a free education in the State of New York." In making its threshold determination as to the applicable standard of review of the equal protection claim made under both Federal and State equal protection clauses, the court held that handicapped children, as such, did not constitute a "suspect classification." It also held, citing *Rodriguez*, that the right to education,

recognized both by State Constitution and statute, was not such a "fundamental constitutional right" as to be entitled to special constitutional protection. The court accordingly rejected the strict scrutiny test and adopted the rational basis test as the proper standard of review. Applying that standard, the court found that the differentiation between classes of handicapped children rested on a rational basis and did not offend equal protection principles. Thus, it is seen that while *Rodriguez* has been followed in New York as authority for the proposition that the right to education is not such a fundamental constitutional right as to invoke special constitutional protection through a strict scrutiny standard of review, it has not precluded the Court of Appeals from considering an equal protection claim founded in part on the Federal clause by use of the rational basis test.

In the case of the plaintiffs-intervenors, their claim of denial of equal protection is based on discrimination in the operation of the State aid formula which bears no reasonable relation to the purpose of the statute. Using the rational basis test the court has found that the State aid statute in its operational effect created a classification which as to the plaintiffs-intervenors lacked a rational basis and was discriminatory, thereby constituting a denial of equal protection of the law under the New York Constitution. For the same reasons, there is a denial of equal protection of the law under the Fourteenth Amendment.

EDUCATION CLAUSE

[19] In its discussion of the education clause of the New York Constitution (art XI, § 1) and its application to the claims of the original plaintiffs, the court stated that such provision imposes on the State the obligation to assure to each school child an educational program that is appropriate to that child's needs (see *Matter of Downey*, 72 Misc 2d 772, *supra*; cf. *Matter of Levy*, 38 NY2d 653, 657-658, *supra*). Recent decisions that have considered provisions in the constitutions of other States similar to but not identical with New York's education clause have interpreted them as guaranteeing equal educational opportunity for school children in such States (see *Robinson v Cahill*, 62 NJ 473, 513, cert den *sub nom. Dickey v Robinson*, 414 US 976, *supra*; *Horton v Meskill*, 172 Conn 615, 647-651, *supra*).

Viewed in the light of New York's long historical concern

for providing free education to its school children, the education article must be regarded as also guaranteeing to all the children of the State an equal opportunity to acquire basic minimal educational skills. (Report of the Commission on Common Schools [1812]; Report of the Select Committee on the Petitions for the Amendment or Repeal of the Free School Law [1850]; Report of the Special Joint Committee on Taxation and Retrenchment, Legis Doc [1925] No. 97.) A like interpretation has been given New Jersey's comparable constitutional provision by that State's Supreme Court: "The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." (*Robinson v Cahill, supra,* p 515.)

Many pupils in the large urban school districts of the State fail to acquire basic minimal educational skills while attending schools in such districts. There are many pupils in those districts who fail to achieve minimum levels of competence as measured by State standards.

Despite the fact that the large city school districts have grossly disproportionate numbers and concentrations of pupils who are deficient in basic skills, the State aid system provides them with reduced aid per pupil and reduced aid per special needs pupil. The formulation by which aid is provided is intended to assure equal educational opportunity throughout the State by distributing aid in proportion to a particular district's need. Where it is demonstrated that there is a greater need, it follows that a greater amount of aid must be furnished if equal educational opportunity is to be available. Something more than average aid to school districts must be furnished to accomplish that goal. A failure to do so not only means not achieving such goal but is tantamount to excluding those many under-achieving pupils from the educational program.

The education article raised to constitutional stature a long-standing major objective of New York's free public school system, namely, to give to all the State's school children the opportunity to acquire at least those basic skills necessary to function as a citizen in a democratic society. That objective found expression in the Report of the Commission on Common Schools (1812) where it was stated (p 720): "In these schools should be taught, *at least,* those branches of education which

are indispensably necessary to every person in his intercourse with the world, and to the performance of his duty as a useful citizen. Reading, writing, arithmetic, and the principles of morality, are essential to every person, however humble his situation in life." (Emphasis supplied.)

By providing reduced aid per pupil and reduced supplemental aid per special needs pupil to the large city school districts and by failing to take into account adequately their major education overburdens, including their large numbers of pupils lacking basic minimal educational skills, the State aid formula violates section 1 of article XI of the New York State Constitution.

EQUAL PROTECTION AND EQUAL EDUCATIONAL OPPORTUNITY

[20] In the preceding segment it was shown that by providing less aid to large city school districts with the largest education overburdens there was a violation of the education clause. At this point it is demonstrated that there is an equal protection violation as well because of the resulting denial of equal educational opportunity.

The Supreme Court in *Rodriguez* noted (411 US 1, 37, *supra)* that on the record it had before it the claim could not be made that the Texas school finance system failed "to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." The inference to be drawn from that statement appears to be justified that if there had been a showing of such "absolute deprivation" the court would have felt justified in finding an equal protection violation. It is interesting to note that in a subsequent decision the Supreme Court found that teaching Chinese-speaking pupils only in English denied such children "a meaningful opportunity to participate in the educational program". *(Lau v Nichols,* 414 US 563, 568.) Although a violation of the Federal equal protection clause was argued in *Lau,* the Supreme Court chose not to reach that argument, resting its decision on a section of the Civil Rights Act of 1964 which forbade discrimination based on the ground of race, color, or national origin. Accordingly, reference to *Lau* is not made to directly support an equal protection argument here, but rather to illustrate the point that the Supreme Court has recognized that equality of treatment is not achieved under State-imposed standards

"merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are foreclosed from any meaningful education." (*Lau v Nichols*, p 566, *supra*.)

While it was unnecessary for the court to reach the equal protection claim in *Lau* because of specific provisions in a Federal statute and regulations implementing the same, the case is important as indicating that when substantial numbers of pupils are deprived of "a meaningful opportunity to participate in the educational program" of a public school system there is discrimination. In *Lau* the discrimination was rooted in the failure to provide ways and means to give English language skills to non-English-speaking pupils. Here discrimination is found in the fact that large numbers and concentrations of pupils in large urban school districts, seriously deficient in basic minimal educational skills are denied an opportunity for meaningful participation in the educational program. It is the position of the intervenors that it is the proven educational failure rates of pupils in the big city school districts that warrant invoking equal protection principles.

The Supreme Court has observed that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike" (*Jenness v Fortson*, 403 US 431, 442). If equal treatment of unequals is discriminatory, then providing less favorable treatment of unequals has to be regarded as even worse discrimination. The State aid statute in failing to give effect to the inordinate education overburdens of the large city school districts and as a result providing them less assistance operates in a discriminatory fashion and violates the requirements of equal protection of the law under both section 11 of article I of the New York State Constitution and the Fourteenth Amendment to the United States Constitution.

THE RELIEF

[21] It is appropriate at this point to comment on the matter of the relief that may properly be granted to both groups of plaintiffs in this litigation.

The primary relief sought by the original plaintiffs is a judgment declaring that the State's system for financing public schools is invalid on constitutional grounds. Those plaintiffs request that the court retain jurisdiction of the action for a period of time in order that the Legislature may fashion a constitutional system. In the event that the Legislature fails

to do so, the original plaintiffs ask that the court enjoin the continuation of the system declared constitutionally invalid.

The primary relief sought by the plaintiffs-intervenors is that of a judgment declaring that the State's system for providing State aid to them is unconstitutional. In addition, they ask that the court issue a direction to the Legislature to "make corrections in the state operating expense aid formula to overcome the defects thus declared." The balance of the relief sought by the plaintiffs-intervenors includes a request for the court to retain jurisdiction of the action for a period of time to permit enactment of modified State aid provisions that are constitutional. Failing such enactment, they request that the court redirect State funds to school districts on an interim basis.

It is the proper function and duty of the judicial branch of government to render a judgment declaring whether a statutory plan is in compliance with constitutional requirements. It is equally the proper function and duty of the legislative branch to devise a State educational finance system that is constitutional. That is the command of the education article of the New York Constitution (art XI, § 1). There exists a considerable body of knowledge developed in recent years upon which other States have drawn in revising their systems for financing public education. In New York those who have studied its system have made recommendations for change. Proposals for revision in New York have come from consultants, special commissions and members of State government. With that in mind, this court has deemed it necessary to refrain from expressing an opinion as to the appropriateness of any particular means or technique for attaining a suitable school finance system in this State believing that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them" (*San Antonio School Dist. v Rodriguez*, 411 US 1, 59, *supra*).

The Legislature must be afforded an opportuntiy to develop a suitable plan for the revision of the State's system of financing public education. (See *Horton v Meskill*, 172 Conn 615, —, 376 A2d 359, 375, *supra*; cf. *Brown v Board of Educ.*, 349 US 294, 301.) It is a well-established principle that even though a litigant has been declared to have a legal right, courts should not grant relief in a manner likely to produce disorder and confusion in public affairs (*Matter of Andresen v Rice*, 277 NY 271, 282; *Matter of Madden v Reavy*, 284 NY

418, 422). This principle has been invoked in more recent times in connection with determinations affecting governmental affairs. (See *Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1, 13-14, mod 39 NY2d 920 [real property assessment]; *Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d 731, 741 [New York State Emergency Moratorium Act for City of New York].)

Accordingly, the court's conclusion that each group of plaintiffs is entitled to judgment declaring the challenged school finance system unconstitutional shall have prospective operation only. Such declaration, however, shall not prevent the continued operation of the State's school system under existing statutes nor invalidate past or future obligations incurred for the operation of the school system pursuant to applicable statutes which shall continue in effect until changed by legislative action or until such time as operations under them are specifically enjoined by the court. (See *Robinson v Cahill*, 118 NJ Super 223, 280-281, mod and affd 62 NJ 473, cert den *sub nom. Dickey v Robinson*, 414 US 976; cf. *Horton v Meskill*, 172 Conn 615, 649-650, *supra*.)

The court will retain jurisdiction of the action but otherwise withhold judicial intervention to afford the Legislature the opportunity to take appropriate action.

An appropriate judgment shall be settled on notice. Specific provisions shall be included in the judgment to permit the continued operation of the State's school system under existing statutes and to assure the validity and enforceability of past and future acts and obligations incurred under applicable statutes as long as they remain operative.

COMMENT

The court expresses its appreciation to all the attorneys who had a role in the presentation of this case during and after trial.

They are commended for the thoroughly professional manner in which the case was tried and for the comprehensive posttrial submissions which reflected great diligence and effort.

For their consistently co-operative and courteous relationship with the court, all counsel have its sincere thanks.

Judgment of the Supreme Court, Nassau County, dated December 22, 1978

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 8208/74

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, et al.,

Plaintiffs,

BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, et al.,

Plaintiffs-Intervenors,

—against—

EWALD B. NYQUIST, Commissioner of Education, et al.,

Defendants.

JUDGMENT

The issues in this action, which is for a Judgment declaring unconstitutional New York's system for financing the State's public elementary and secondary schools, having duly come on to be heard before Justice L. Kingsley Smith, without a jury at a Trial Term, Part 4, of this Court on the 21st day of April, 1976, and the issues having been tried, and the plaintiffs having appeared by Kramer, Lowenstein, Nessen, Kamin & Soll, Esqs., their attorneys, the plaintiffs-intervenors having appeared by Rauh, Silard & Lichtman, Esqs., their attorneys, and the defendants having appeared by the Attorney General of the State of New York, their attorney, and the proofs of all parties having been adduced and their respective counsel hav-

ing been heard, and all parties having submitted requests for findings of fact pursuant to CPLR § 4213(a), and the Court having duly deliberated upon the proofs adduced at trial and passed upon each request for findings of fact submitted by the parties, rejecting those that were redundant, not founded in the record, or irrelevant to the issues, and modifying those requiring modification, and the Court having rendered its Decision in writing in favor of the plaintiffs and the plaintiffs-intervenors on June 23, 1978, which Decision directs the parties to settle a Judgment declaring unconstitutional the existing public school finance system of the State of New York, and the Court having denied the defendants' motion to reconsider by memorandum decision of even date herewith.

Now, on motion of plantiffs and plaintiffs-intervenors, it is

Adjudged and Decreed That:

1. New York's system for financing public elementary and secondary education is hereby declared unconstitutional in that:

a. The Legislature has created a public school finance system wherein the level of expenditure and the consequent availability of educational resources in the State's public elementary and secondary schools are largely a function of the amount of property wealth per child that happens to be located within the boundaries of the various school districts, which have unequal access to taxable real property wealth. This circumstance discriminates against property-poor school districts, those who pay property tax in such school districts and children who attend public elementary and secondary school in them. The system cannot be justified by reference to valid objectives of the legislature, which could employ less objectionable alternatives. Nor does actual operation of the statutory system bear a rational relationship to the objectives for which it was devised. Accordingly, New York's public school finance system violates the equal protection clause of the State Constitution (Article I, Section 11).

b. In failing adequately to recognize the varying capabilities of districts to raise educational funds through taxes levied on widely disparate real property tax bases and to correct for those disparities through the distribution of state aid, the system of state aid for primary and secondary education is not sufficient aid, the system does not satisfy the State's primary constitutional obligation to provide for "the maintenance and support of a system of free common schools wherein all the children of the state may be educated." Accordingly, New York's public school finance system violates the education article of the State Constitution (Article XI, Section 1).

c. A major purpose underlying state aid for public education in New York, historically and under Chapter 241 of the 1974 Laws, has been to equalize the varying capabilities of the State's school districts to finance public education. While the aid statute purports to accord equal treatment to all school districts, it fails to give effect to certain overburdening conditions that affect four of the State's five largest cities and the schools located within their boundaries. Specifically, the aid formula:

(1) Disregards the "municipal overburden" drain on these cities' tax dollars caused by the need to provide an enormous amount of non-educational services;

(2) Disregards the diminished power of the urban dollar in purchasing educational resources as a result of the higher cost factors found in the cities;

(3) Disregards the increased school costs caused by the far higher rates of student absenteeism prevailing in these city school districts and actually penalizes the city school districts for their higher student absenteeism;

(4) Fails to take adequate account of the increased costs arising from the far greater concentrations and numbers of disadvantaged, handicapped and other students with special needs, and actually provides reduced

and below average state aid supplements for such students in these city districts except Buffalo.

The result of the state aid formula's failure to give effect to these overburdening factors is an overstatement of the city districts' capacity to finance public education and an arbitrary and irrational deprivation of state aid. Accordingly, New York's school finance system violates the equal protection clauses of the State Constitution (Article I, Section 11) and of the Federal Constitution (the Fourteenth Amendment).

d. These four large city school districts have the most difficult and most expensive school populations to educate. But with the largest concentrations of disadvantaged children requiring expensive compensatory education they are unable to meet their needs from local revenue sources; yet the statutory aid formula largely disregards their unique education overburdens. The aid formula denies equal educational opportunity and equal treatment to children in these city school districts when it fails to give fair and adequate consideration to their special and severe educational overburdens. Accordingly, New York's school finance system violates the education article of the State Constitution (Article XI, Section 1) and the equal protection clauses of the State Constitution (Article I, Section 11) and of the Federal Constitution (the Fourteenth Amendment).

e. Because these four city school districts serve unparalleled concentrations of disadvantaged school children more difficult and expensive to educate, but do not have either local or state educational resources to meet that need, educational performance in city school districts is severely depressed. Many pupils fail to acquire basic minimal educational skills while attending schools in those districts, and even more fail to achieve minimum levels of competence as measured by state standards. In its restriction of aid to these city districts and its disregard of their educational burdens the aid statute denies such children equal opportunity to acquire basic minimal educational skills. Accordingly, New York's public school fi-

nance system violates the education article of the State Constitution (Article XI, Section 1) and the equal protection clauses of the State Constitution (Article I, Section 11) and of the Federal Constitution (the Fourteenth Amendment).

2. The use of local school districts in providing a system of free public schools does not violate the Constitutions of the State of New York or of the United States.

3. The use of locally imposed real property taxes to support a system of free public schools or for other governmental purposes does not violate the Constitutions of the State of New York of of the United States.

4. This Judgment shall have prospective operation only. The declaration of the rights of the parties contained herein shall not prevent the continued operation of the State's public school finance system under existing statutes, until such time as those statutes are changed by legislative action or operations under them are specifically enjoined by the Court. Notwithstanding any of the foregoing terms or provisions hereof, nothing herein shall be deemed to limit, impair or affect any bonds heretofore or hereafter issued or authorized for public school purposes, or any notes or other obligations at any time authorized or issued in anticipation of such bonds, or any taxes levied or required to be levied with respect to any such bonds, notes or other obligations (all herein called "obligations"), or the expenditure or other application of proceeds of any such taxes or obligations; and for so long as any of such obligations shall remain unpaid as to any principal or interest, nothing herein contained or done pursuant hereto shall be applied or construed to affect the validity or binding effect of such obligations, the creation or legal existence of the issuer thereof, or shall, in the event any of such obligations shall not be paid as to principal or interest when due, invalidate, modify or otherwise affect the meaning or legal effect of any laws or statutes of this State in effect at time of issuance of such obligations relating to the assessment, levy or collection hereaf-

ter and the application of property taxes to pay such principal or interest or judgments therefor or relating to the enforcement and payment of any such obligations or judgments and interest thereon.

5. The Court will retain jurisdiction of this action for a reasonable period of time to afford the Legislature an opportunity to enact legislation providing for a public school finance system which does not violate either the State Constitution or the Federal Constitution. In the event the Legislature fails to act within a reasonable period of time to remedy the constitutional defects present in the system of public school finance, plaintiffs and/or plaintiffs-intervenors may apply to this Court, on notice to all other parties, for such other and further relief against the defendants or their successors, including injunctive relief, as may be necessary or appropriate to provide them with a complete remedy.

6. Defendants have moved for reconsideration of this Court's Decision on the ground that recent legislative enactments have rectified all but one of the unconstitutional inequities of the State's system of school finance described in the Decision. The Court has carefully reviewed the statutes cited, and denies defendants' motion because none of the statutory changes materially affect the rulings of unconstitutionality set forth in the Decision and in the above paragraphs of this Judgment.

7. No party shall have the costs and disbursements of this action as against any other party.

ENTER,

/s/ L. Kingsley Smith
J.S.C.

Judgment signed December 22, 1978.

Memorandum of the Supreme Court, Nassau County, dated December 22, 1978

SUPREME COURT
NASSAU COUNTY

Special Term Part I (Index No. 8208/74)

By SMITH, J.

Dated December 22, 1978

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, et al.,

Plaintiffs,

BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, et al.,

Plaintiffs-Intervenors,

—against—

EWALD B. NYQUIST, Commissioner of Education, et al.,

Defendants.

NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SOLL, ESQS.
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RAUH, SILARD & LICHTMAN, ESQS.
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Washington, D.C.

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants
Two World Trade Center
New York, N.Y.

The defendants have moved for reconsideration of the Court's decision dated June 23, 1978. By its terms the motion is made upon the ground of newly discovered evidence (CPLR 5015(a)(2)). Both groups of plaintiffs have opposed the motion as being untimely and lacking in merit. In a strict sense, the motion is untimely because no judgment has been entered. Viewed as a post-trial motion under CPLR 4404(b), plaintiffs assert that the motion has not been made within the time requirement applicable to such a motion (CPLR 4405). Despite the questionable basis for a motion founded on what is claimed to be "newly discovered evidence," the Court is of the opinion that in the circumstance of this action the disposition of the defendants' motion ought not to rest on the narrow ground of whether it was made in a timely manner. Since a post-trial motion on the ground of newly discovered evidence might well lie under CPLR 4404(b), the Court will treat this motion as though made under that provision and entertain the application as if timely made (see, Book 7B Civil Practice Law and Rules 4405 [Supplementary Pamphlet 1964 to 1978 (McKinney's 1978)] Siegel-Supplementary Practice Commentary, pp. 146-148; CPLR 2004).

Essentially, the defendants rely on certain legislative enactments that have taken place subsequent to the time periods that were encompassed within the framework of this action. Those statutory enactments, which the Court will not specifically delineate, appear to introduce some additional funds into the school finance system and provide some financial relief to governmental subdivisions of the State. While these measures have positive effects, they have not, in the Court's opinion, cured the constitutional deficiencies which the Court's decision found to exist in the State's educational finance system (*Board of Educ. v. Nyquist,* 94 Misc. 2d 466).

In urging that the various legislative actions taken have operated to render moot or obsolete the Court's findings in all but one respect, the defendants fail to come to grips with the essential substance of the decision, i.e., that the State's system of funding public education, when viewed in its entirety, fails to provide equal educational opportunity to all children of the State. The defendants have not suggested as a basis for their

motion that the legislation relied upon was intended to address the inequities described in the decision. The Court remains confident that the Legislature, now cognizant of the Court's decision, will address the problem with the collective wisdom, imagination and vigor required to produce a system that will equitably take into account the needs of all school children.

The defendants should not expect the Court to re-evaluate its findings in the light of every dollar that may be earmarked for or find its way into a system whose over-all operational effect fails to afford equal access to educational dollars because of its failure to recognize adequately the educational needs of all students and the financial capabilities of the governmental entities called upon to satisfy those needs. The statutes relied upon in making the present motion represent well-intentioned efforts to make adjustments in a flawed system but without meaningful change or effect upon the basic deficiencies of a constitutionally unacceptable system of financing public education. The defendants' motion to reconsider is, accordingly, denied.

Simultaneously with the making of the foregoing motion, the defendants submitted a proposed counter-judgment in this action and asked that, as an alternative to granting their motion to reconsider, the Court accept such counter-judgment as the form of judgment to be entered. The Court has had the benefit of the form of judgment initially proposed by both groups of plaintiffs; the defendants' counter-judgment; the written comments of all counsel on the proposed forms of judgment; and a revised form of judgment submitted in behalf of the two groups of plaintiffs after review of and comments upon the defendants' counter-judgment.

The Court has carefully reviewed the foregoing material and, with some changes, has accepted the revised form of judgment submitted by the prevailing parties which has incorporated certain of the matters proposed for inclusion by the defendants. A specific provision relating to the disposition of the defendants' motion to reconsider is set forth in the judgment. This decision and the judgment are being signed and filed simultaneously.

/S/ L. KINGSLEY SMITH
J.S.C.

Memorandum of the Supreme Court, Nassau County, dated March 29, 1976

SUPREME COURT
NASSAU COUNTY

Special Term Part I (Index No. 8208/74—3/29/76)

By SMITH, J.

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, et al.,

Plaintiffs,

BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK,

Plaintiffs-Intervenors,

—against—

EWALD B. NYQUIST, Commissioner of Education, et al.,

Defendants.

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MEMORANDUM

This action is one which seeks a declaratory judgment and certain other related relief. The plaintiffs who originally commenced the action in 1974 comprise twenty-five boards of education of school districts of the State as well as students and their parents residing in various districts. The defendants are the Commissioner of Education, the University of the State of New York, the Comptroller of the State of New York and the Commissioner of Taxation and Finance. The additional parties who were permitted to intervene as plaintiffs-intervenors are school boards and officials of the four largest cities in the State, the United Parents Associations of New York City, Inc. and school children and parents residing in those cities.

The original plaintiffs seek a judgment declaring "that the State's scheme for financing its public elementary and secondary school violate the Equal Protection Clause and the Education Clause of the State Constitution as well as the Equal Protection Clause of the United States Constitution." It is their contention that the State's method of financing its public elementary and secondary schools violates the State Constitution's Equal Protection Clause by making the allocation of educational resources among the children of the State a function of the real property wealth of the school districts in which the children's schools are located. This, it is claimed, arbitrarily and invidiously discriminates against school districts, children who attend public school in such districts and their parents. The original plaintiffs further contend that the State's method of financing such schools violates the Education Article of the State Constitution because the State has created more than seven hundred separate school districts within its boundaries which are disparately endowed with real property wealth and has permitted the allocation of the State's educational resources to be determined by the fortuitous circumstance of wealth distribution among the districts and without regard to sound educational criteria or objectives. It is therefore claimed that the method of financing fails to create a single statewide system of free common schools and deprives school districts,

the children attending schools in such districts and their parents of their rights under the Education Article of the State Constitution. That portion of the original plaintiffs' action which alleges violation of the Equal Protection Clause of the Federal Constitution is not being pressed in the light of the United States Supreme Court decision in *San Antonio School District v. Rodriguez*, 411 U.S. 1. That claim has not been abandoned but expressly reserved in the event the Supreme Court reconsiders its holding in the last cited case (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, p. 8).

The plaintiffs-intervenors allege that the statute which furnishes operating expense aid to school districts (Laws of New York 1974, Chap. 241) violates the Equal Protection Clause and the Education Article of the State Constitution and the Fourteenth Amendment to the Federal Constitution. It is alleged that the statute is unconstitutional because in undertaking to grant state operating expense aid to local school districts in proportion to their lack of local taxable resources for financing public education, it employs such an arbitrary and inadequate a measure of local incapacity that the large urban school districts (rendered poorest in school finance resources due to the greater burdens of municipal services and school costs) are treated as wealthy and receive far less state aid than other school districts which have more local resources for providing education to their students. Further, it is alleged that the statute in undertaking to grant special assistance to school districts for their students who require compensatory schooling services, arbitrarily and inequitably grants less and inadequate aid per student in the largest urban districts having the highest concentrations of such students and accordingly the greatest need for the compensatory school services with which to provide them with learning opportunities.

By direction of the Administrative Judge of Nassau County this action was assigned for all purposes to the undersigned. At a preliminary conference with counsel for the respective parties it was agreed that the trial of the action would commence on April 21, 1976 with leave to the defendants to bring on a

motion for summary judgment by March 29, 1976 if they so decided. There is now presented, shortly before the trial is to begin, a motion by the defendants which seeks summary judgment in their favor and against the original and intervening plaintiffs upon several grounds.

In support of the motion the defendants rely upon *San Antonio School District v. Rodriguez, supra,* and the recent decision of the Court of Appeals in *Matter of Levy,* __NY 2d__ (February 17, 1976). In *Rodriguez* the Supreme Court found, *inter alia,* that (a) the Texas school-financing system did not violate the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution; (b) application of the "strict scrutiny" test inappropriate; and (c) the Texas system met the "rational relationship" or "rational basis" test. In *Matter of Levy* the Court of Appeals held that Section 234 of the Family Court Act is constitutional notwithstanding its authorization to the Family Court in the City of New York to require parents of handicapped children, other than children who are blind or deaf, to contribute to the maintenance of such children in connection with their education. In that case the challenge of the statute was based upon claims of a denial of equal protection of the law. The Court, before deciding the ultimate question of the constitutionality of the statute under attack, considered and determined what standard of review to employ. It found that the appropriate standard was not the "strict scrutiny" test but the traditional "rational basis" test.

The defendants' position, in reliance on the foregoing authorities, is that the state aid method in New York by which money is funnelled to the local school districts according to state formulas is constitutional and presents no question of fact requiring a trial. In this connection, no claim is made that the school-financing systems of Texas and New York are the same. The Court cannot agree that the claims of a violation of constitutional rights in this case may be determined without the benefit of a plenary trial. The Court's function on a motion for summary judgment, as it has often been stated, is not issue determination but issue finding (*Esteve v. Abad,* 271 App. Div. 725; see also, *Sillman v. Twentieth Century Fox F. Corp.,*

3 N Y 2d 395). The existence of a genuine and substantial issue of fact requires the denial of the motion. The finding that the Texas system combining state aid and local district taxation was not in and of itself unconstitutional does not resolve the question of whether the school-financing system of New York satisfies the requirements of this State's constitution. That is to say, whether the system or scheme adopted by New York to meet the mandated obligation for funding public schools conforms to constitutional standards cannot be determined simply by reference to the fundamental method of acquiring tax dollars. This is so whether the "strict scrutiny" test or the "rational relationship" test is the appropriate one to employ. The Court does not find any authority cited by the defendants to the contrary. It should be noted that plenary hearings were held in cases which have dealt with claims such as those contained in the complaints in this action (*San Antonio School District v. Rodriguez, supra; Horton v. Meskill*, 332 A.2d 113 (Conn.); *Robinson v. Cahill*, 303 A.2d 273 (New Jersey). Summary resolution of constitutional issues raised in connection with a comprehensive legislative program for state educational financing has been expressly disapproved upon the ground that "since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing" (*Askew v. Hargrave*, 401 U.S. 476, 479).

The claim of the defendants that all the plaintiffs and plaintiffs-intervenors except those who are students or parents of students do not have standing to maintain this action lacks merit. The Court is satisfied on the authority of *Board of Education v. Allen*, 20 N Y 2d 109 that the board of education and public officials have standing in this action. The Court is similarly satisfied that the United Parents Association of New York, Inc. has standing (*cf., National Organization for Women v. State Division of Human Rights*, 34 N Y 2d 416, at 420, n.3; see also, *Matter of Douglaston Civic Association v. Galvin*, 36 N Y 2d 1, 6). In any event, since the plaintiff school children and their parents have standing, which defendants have not

challenged, the situation is presented that at least some of the plaintiffs do have standing and this has been held sufficient to warrant the court hearing the case on its merits (*Buckley v. Valco*, 96 S. Ct. 612, 631).

The defendants' claim that no justiciable controversy is presented must be rejected. Both state and federal courts have concluded that cases which have put in issue the constitutionality of state systems for school-financing presented justiciable controversies and have decided them on their merits (*San Antonio School District v. Rodriguez, supra; Robinson v. Cahill, supra; Horton v. Meskill, supra*). Judicial review of the propriety of legislative action does not call upon the Court to invade the legislative area nor does it operate to deprive the legislature of its proper and traditional functions.

There remains the claim of the defendants that this law suit may not be maintained as a class action. Neither the original plaintiffs nor the plaintiffs-intervenors have addressed this point despite the fact that the respective complaints contain allegations that the suit is brought as a class action. In this posture they must be regarded as not having opposed the defendants on this claim. The Court is of the opinion that in the circumstances of this case the granting of class relief would not be warranted since governmental operations are involved. If any relief is ultimately granted to the plaintiffs and plaintiffs-intervenors, comparable relief would flow to others similarly situated under principles of *stare decisis (Matter of Rivera v. Trumarco*, 36 N Y 2d 747, 749; *Matter of Jones v. Berman*, 37 N Y 2d 42, 57; *Matter of Brown v. Lavine*, 49 A D 2d 49, 51-52; *Matter of Scarpelli v. Lavine*, 48 AD 2d 899, 900).

Accordingly, so much of the defendants' motion for summary judgment as seeks an order denying the plaintiffs and the plaintiffs-intervenors the right to maintain this law suit as a class action is granted and in all other respects the motion is denied.

Settle order on notice.

J.S.C.

Notice of Appeal by Board of Education, Levittown Union Free School District, Nassau County, et al.

COURT OF APPEALS
STATE OF NEW YORK

Index No. 8208/74
(Nassau County)

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, et al.,

Respondents-Appellants,

BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, et al.,

Intervenors-Respondents-Appellants,

—against—

EWALD B. NYQUIST, Commissioner of Education, et al.,

Appellants-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that Respondents-Appellants Board of Education, Levittown Union Free School District, Nassau County, et al. hereby appeal to the Supreme Court of the United States from so much of the Final Judgment and Order of the New York Court of Appeals, entered on June 23, 1982, as declares that New York's statutory scheme for allocating the State's education resources among local school districts does not violate the Equal Protection Clause of the United States Constitution.

All of the Respondents-Appellants below are parties to this appeal except for the Board of Education of the City of Buffalo, and the Commack and Guilderland school districts.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York
September 3, 1982

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TO: ROBERT ABRAMS
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Respondents-Appellants
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(202) 331-1795

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

EDWARD H. ROSENTHAL, being duly sworn, deposes and says:

I am not a party to the action, am over the age of eighteen and reside at 629 West 115th Street, New York, New York 10025.

On September 3, 1982, I served the within Notice of Appeal to the Supreme Court of the United States upon:

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Appellants-Respondents
Two World Trade Center
New York, New York 10047

RAUH, SILARD & LICHTMAN
Attorneys for Intervenors-Respondents-Appellants
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

by depositing a true copy of same, enclosed in a properly addressed first-class prepaid envelope, in an official depository under the exclusive care and custody of the United States Postal Service in New York. All parties required to be served have been served.

/S/ EDWARD H. ROSENTHAL

Sworn to before me this
3rd day of September 1982

/S/ MARY F. CAHOON
Mary F. Cahoon
Notary Public, State of New York
No. 31-0533310
Qualified in New York County
Term Expires March 30, 1983

Notice of Appeal by Board of Education, City School District of Rochester, New York, et al.

COURT OF APPEALS
STATE OF NEW YORK

No. 317

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, *et al.*,

Plaintiffs-Respondents,

BOARD OF EDUCATION CITY SCHOOL DISTRICT ROCHESTER, NEW YORK, *et al.*,

Plaintiffs-Intervenors-Respondents,

—against—

EWALD B. NYQUIST, Commissioner Of Education, *et al.*,

Defendants-Appellant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Board of Education, City School District of Rochester, New York, et al., the plaintiffs-intervenors-respondents above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, entered in this action on June 23, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/S/ ELLIOTT C. LICHTMAN

JOHN SILARD
JOSEPH L. RAUH, JR.
ELLIOTT C. LICHTMAN
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Counsel for Plaintiffs-Intervenors-Respondents

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by first class mail, postage prepaid, this 7th day of September 1982 upon:

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Amy Juviler, Esq.
Assistant Attorney General
New York State Department of Law
2 World Trade Center
New York, New York 10047

/S/ MARY M. LEVY
Mary M. Levy

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause, U.S. CONST. Amend. XIV, § 1, Cl. 2

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Education Law § 3602 (McKinney 1981)

§ 3602. Apportionment of public moneys to school districts employing eight or more teachers

Notwithstanding any other provisions of this chapter or any other provisions of law, each school district of the state employing eight or more teachers shall receive its apportionment of public money payable during the school year commencing July first, nineteen hundred sixty-two and during subsequent school years pursuant to the provisions of this section and in lieu of any apportionments or payments otherwise payable under any other section of this chapter except any such apportionments or payments that may be payable to such district for school lunches, for services or programs provided by a board of cooperative educational services or by a county vocational education and extension board for such district, for the education of Indian children of a reservation under a contract with the state, by virtue of chapter six hundred thirty-five of the laws of nineteen hundred sixty-one, or for experimental or special programs in selected school districts.

1. Definitions. As used in this section the following terms shall be defined as follows:

a. "Current year" shall mean the school year during which the apportionment is to be paid pursuant to this section.

b. "Base year" shall mean the school year immediately preceding the current year.

c. "Actual valuation" shall mean the valuation of taxable real property in a school district obtained by taking the assessed valuation of taxable real property within such district as it appears upon the assessment roll of the town, city, village, or county in which such property is located, for the calendar year immediately preceding the calendar year in which the base year commenced, after revision as provided by law, and dividing it by the state equalization rate as determined by the state board of equalization and assessment, for the assessment roll of such town, city, village, or county completed during such preceding calendar year. The actual valuation of a central high school district shall be the sum of such valuations of its component districts.

d. "Average daily attendance" shall mean the total number of attendance days of pupils in a public school of a school district plus the total number of instruction days for such pupils receiving home instruction including pupils receiving instruction through a two-way telephone communication system, divided by the number of days the district school was in session as provided in this section. Such average daily attendance of a school district shall from July first, nineteen hundred seventy-eight, and thereafter include the attendance, as computed in accordance with regulations of the commissioner as approved by the director of the budget, in programs of boards of cooperative educational services under contract with such district of pupils with handicapping conditions who were eligible pupils under the provisions of former subdivision nineteen of this section and those previously ineligible handicapped pupils residing in noncomponent districts. For aid payable in the school year nineteen hundred eighty-one–nineteen hundred eighty-two and thereafter the attendance of pupils with handicapping conditions attending, under the provisions of article eighty-nine of this chapter, public schools, boards of cooperative educational services, or private schools in accordance with the provisions of section forty-four hundred two of this chapter shall be added to average daily attendance.

e. "Pupils with special educational needs" shall mean the number of pupils attending the public schools of a district computed as follows: (1) determine the number of third and sixth grade pupils who scored below level four on the reading test and

those who scored below level four on the mathematics test for New York state elementary schools administered in the school years nineteen hundred seventy-four–seventy-five and nineteen hundred seventy-five–seventy-six, provided, however, that a district employing eight or more teachers in such years but not operating a third or sixth grade may use the percentage computed pursuant to this paragraph for the district which in such years enrolled the greatest number of third or sixth grade pupils from such district; divide the sum of such numbers by the number of such third and sixth grade pupils who took each of such tests, provided, however, that a district which in nineteen hundred seventy-four–seventy-five or in nineteen hundred seventy-five –seventy-six did not maintain a home school or employed fewer than eight teachers, and which in the base year employed eight or more teachers, may use the scores in a later test as designated by the commissioner for the purposes of this paragraph; express the result as a percentage carried to one decimal place without rounding and (2) multiply such percentage by the district's base year total aidable pupil units minus the district's additional aidable pupil units computed pursuant to subdivisions nine and nine-a of this section. For the purposes of the computation made pursuant to this paragraph, pupils attending campus schools of the state university shall be included in the numbers of pupils in the district in which they reside. The percentage of such pupils in component districts shall be used in the case of central high school districts.

[f. Repealed.]

g. "Summer session pupils" shall mean those pupils attending approved programs of instruction operated by the district during the months of July and August of the base year in accordance with the regulations promulgated by the commissioner.

h. "Evening school pupils" shall mean pupils who have not obtained a high school diploma or a high school equivalency diploma who are in attendance during the evening hours in a program approved by the commissioner leading to such a diploma or equivalency diploma, and who attend such programs during sessions which are at least the equivalent in length of a half day session as such period is defined by the commissioner.

i. "Pupil wealth ratio" shall mean the number computed to three decimals without rounding obtained when actual valuation

of a school district for the year prior to the base year divided by the total wealth pupil units of such year is divided by the statewide average actual valuation per total wealth pupil unit as computed by the commissioner in accordance with the provisions of this section for such year. Such statewide average actual valuation per total pupil wealth unit shall be established each year by the commissioner before January first pursuant to regulations approved by the director of the budget and transmitted to the school districts. For aid payable in the school year commencing July first, nineteen hundred seventy-nine such statewide average shall be sixty-four thousand. For aid payable in the school year commencing July first, nineteen hundred eighty such statewide average shall be sixty-nine thousand three hundred dollars.

j. "Operating aids base" for the purposes of this section for the school year commencing July first, nineteen hundred eighty shall mean the total amount a district was eligible to receive during the nineteen hundred seventy-nine–eighty school year under the provisions of subdivisions twelve and thirteen or eighteen of this section or under any other law in lieu of such subdivisions divided by the total aidable pupil units used to compute formula aid in the base year and multiplied by such total aidable pupil units less the additional weightings attributable to pupils with handicapping conditions. Where such total aidable pupil units is an average, the additional weightings shall also be averaged.

2. Computation of weighted average daily attendance. For purposes of this section weighted average daily attendance of a school district for any school year shall be computed as follows:

a. Weighted average daily attendance shall be determined by using the average daily attendance of public school pupils in a full-day kindergarten and grades one through six as the basic unit, with the attendance of such pupils in one-half day kindergartens measured at one-half of such basic unit and the attendance of such pupils in grades seven through twelve measured at one and one-quarter of such basic unit. The sum of all such units of attendance shall be the weighted average daily attendance.

b. In computing such attendance, the school district shall (1) determine the number of religious holidays, not exceeding six, which fall on a school day in each of the eight or ten reporting

periods which constitute a school year according to regulations established by the commissioner, such religious holidays to be duly recognized as such for purposes of this section by duly adopted resolution of the board of education and selected from the list of religious holidays prepared by the commissioner pursuant to law; (2) deduct the aggregate attendance on such religious holidays from the total aggregate attendance for each of such eight or ten attendance periods, by grade level; (3) deduct such religious holidays from the total number of school days in each such attendance period, by grade level; (4) compute the average daily attendance and the weighted average daily attendance for each such attendance period; (5) select the four of the eight, or five of the ten, such attendance periods having the highest weighted average daily attendance; (6) compute the average of the weighted average daily attendance for such four or five attendance periods, which shall constitute the weighted average daily attendance for the school year.

c. In any instance where a pupil is a resident of another state or an Indian pupil of a reservation or a pupil living on federally owned land or property, his attendance shall be counted as part of the weighted average daily attendance of the school district in which he is enrolled.

d. Weighted average daily attendance for purposes of determining ceilings for operating expense and size corrections shall be that of the base year; provided, however, that any school district for such purposes such [1] be permitted to use the weighted average daily attendance averaged over the three year period immediately preceding the current year.

e. Resident weighted average daily attendance for purposes of determining the aid ratio of a school district for any school year shall be the weighted average daily attendance for the school year immediately preceding the base year, less the weighted average daily attendance of nonresident pupils attending public schools in the district for such school year, plus the weighted average daily attendance of pupils resident in the district but attending public schools in another district or state plus the weighted average daily attendance of pupils resident in the district but attending full-time a school operated by a board of cooperative educational services or a county vocational education and extension board for such school year. The attendance of

nonresident pupils attending public school in the district and resident pupils attending such schools outside of the district shall be determined by applying to the number of such pupils registered during the school year in each case the ratio of aggregate days attendance to the possible aggregate days attendance of all pupils in attendance in the district. Indian pupils of a reservation attending public school, or pupils living on the United States military reservation at West Point attending public school, shall be deemed to be resident pupils of the district providing such school, for purposes of this paragraph. Where a school district has entered into a contract with state university pursuant to paragraph *o* of subdivision two of section three hundred fifty-five of this chapter under which the school district makes payments in the nature of tuition for the education of certain children residing in the district, such children for whom such tuition payments are made shall be deemed to be resident pupils of such district for the purposes of this paragraph.

f. In determining the resident weighted average daily attendance of a component school district of a central high school district for computing aid ratio the weighted average daily attendance of high school pupils residing in such component district and attending the central high school shall be included. The resident weighted average daily attendance of a central high school district itself shall be the sum of the resident weighted average daily attendance of each component school district computed as provided in the first sentence of this paragraph.

g. Notwithstanding the provisions of paragraphs e and f of this subdivision, when a school district shall experience an increase in resident weighted average daily attendance during the current year because of the closing in whole, or in part, of a non-public school or a campus school, or a school previously operated by the United States government on the United States military reservation at West Point, the commissioner, in computing any aid ratio of such district, shall permit the use of such additional resident weighted average daily attendance for aid ratio purposes during the current year and the next succeeding year, provided that such additional resident weighted average daily attendance attributable to such closing, or part thereof, shall be in excess of one hundred students; provided, however, that such district which qualifies for an increase in total wealth

pupil units pursuant to paragraph c of subdivision two-b of this section, shall use the increase in resident weighted average daily attendance, even if such increase in resident weighted average daily attendance is less than one hundred.

h. After the final computation of aid as provided in subdivision eighteen of this section, a school district which maintains an elementary school and which does not operate a kindergarten through twelve program and contracts for education of some or all of its secondary pupils in another school district which has a higher pupil wealth ratio used for the current year for the computation of operating aid may elect to receive the tuition adjustment provided under the terms of this subdivision. The total aid receivable under subdivision eighteen of this section by the sending district for the current year shall be divided by the total aidable pupil units of the sending district used for computation of aid for the current year and such amount multiplied by the number of secondary pupils for whom the contract is made. The resulting tuition adjustment will be paid to the sending district in addition to the aid computed under the provisions of subdivision eighteen of this section. The total aid receivable under subdivision eighteen of this section by the receiving district for the current year shall be divided by its total aidable pupil units used for computation of aid for the current year and such sum multiplied by the number of secondary pupils received by such district from the sending district during the current year and such sum shall be deducted from the amount the receiving district would be entitled to under the provisions of subdivision eighteen of this section. If the sending district elects to receive this adjustment, the tuition payable to the district furnishing instruction shall be computed in accordance with regulations adopted by the commissioner.

2-a. Computation of adjusted average daily attendance. For purposes of this section adjusted average daily attendance of a school district for any school year shall be computed as follows:

a. Adjusted average daily attendance shall be determined by using the average daily attendance of public school pupils in a full-day kindergarten and grades one through twelve as the basic unit, with the attendance of such pupils in one-half day kindergartens measured at one-half of such basic unit. The sum of all such units of attendance shall be the adjusted average daily attendance.

b. In computing such attendance, the school district shall (1) determine the number of religious holidays, not exceeding six, which fall on a school day in each of the eight or ten reporting periods which constitute a school year according to regulations established by the commissioner, such religious holidays to be duly recognized as such for purposes of this section by duly adopted resolution of the board of education and selected from the list of religious holidays prepared by the commissioner pursuant to law; (2) deduct the aggregate attendance on such religious holidays from the total aggregate attendance for each of such eight or ten attendance periods, by grade level; (3) deduct such religious holidays from the total number of school days in each such attendance period, by grade level; (4) compute the adjusted average daily attendance for the school year.

c. In any instance where a pupil is a resident of another state or an Indian pupil of a reservation or a pupil living on federally owned land or property, his attendance shall be counted as part of the adjusted average daily attendance of the school district in which he is enrolled.

2-b. Computation of total wealth pupil units. a. For the school years commencing July first, nineteen hundred seventy-nine and thereafter total wealth pupil units will be computed using the adjusted average daily attendance for the year prior to the base year as computed in this section, plus the attendance of resident pupils attending public school elsewhere, less the attendance of nonresident pupils plus the attendance of resident pupils attending full-time in board of cooperative educational services (not otherwise specifically included), plus, for aid payable in the school year nineteen hundred eighty-nineteen hundred eighty-one the attendance of pupils with handicapping conditions for whom the district has contracted under the provisions of section forty-four hundred two of this chapter, plus the additional aidable pupil units as computed pursuant to subdivisions nine and nine-a of this section, excluding summer and evening school pupils. The attendance of nonresident pupils attending public school in the district and resident pupils attending such schools outside of the district shall be determined by applying to the number of such pupils registered during the school year in each case the ratio of aggregate days attendance to the possible aggregate days attendance of all pupils in attendance in the district. Native American pupils of a reservation attending public school, or pupils living on the United States military reservation at West Point attending public school, shall

be deemed to be resident pupils of the district providing such school, for the purposes of this paragraph. Where a school district has entered into a contract with state university pursuant to paragraph o of subdivision two of section three hundred fifty-five of this chapter under which the school district makes payment in the nature of tuition for the education of certain children residing in the district, such children for whom such tuition payments are made shall be deemed to be resident pupils of such district for the purposes of this paragraph. A school district may elect the highest seven of eight or nine of ten attendance periods for the purpose of computing wealth units.

b. In determining the total wealth pupil units of a component school district of a central high school district for computing aid ratio the total wealth pupil units of high school pupils residing in such component district and attending the central high school shall be included. The total wealth pupil units of a central high school district itself shall be the sum of the total wealth pupil units of each component school district.

c. Notwithstanding the foregoing provisions of this subdivision, when a school district shall experience an increase in total wealth pupil units during the current year because of the closing in whole, or in part, of a nonpublic school or a campus school, or a school previously operated by the United States government on the United States military reservation at West Point, the commissioner, in computing any aid ratio of such district, shall permit the use of such additional total wealth pupil units during the current year and the next succeeding year, provided that such additional total wealth pupil units attributable to such closing, or part thereof, shall be in excess of one hundred students; provided, however, that such district which qualifies for an increase in resident weighted average daily attendance pursuant to paragraph g of subdivision two of this section, shall use the increase in total wealth pupil units, even if such increase in total wealth pupil units is less than one hundred.

3. Computation of aid ratios. a. Building and board of cooperative educational services aid ratios. The aid ratio to be used in determining building aid apportionments to any school district pursuant to this section and for boards of cooperative educational services shall be computed in the following manner:

(1) The actual valuation of such district shall be divided by its resident weighted average daily attendance as computed pursuant to this section to determine its actual valuation per resident pupil.

(2) The commissioner before January first of each year shall determine the state average actual valuation per pupil in weighted average daily attendance for the preceding school year and shall transmit such figure to the school districts.

(3) Such actual valuation per resident pupil of the school district shall be divided by such state average actual valuation per pupil and the result, carried to three decimal places without rounding multiplied by fifty-one per centum, and the result expressed as a percentage carried to one decimal place without rounding.

(4) The aid ratio of such district shall be the excess, if any, of one hundred per centum over the amount obtained in subparagraph three of this paragraph, but in no case more than ninety per centum.

b. Computation of first ceiling operating aid ratio. The first ceiling aid ratio shall be computed by subtracting from one the product obtained by multiplying fifty-one per centum by the pupil wealth ratio. This aid ratio shall be expressed as a decimal carried to three places without rounding, but shall not be less than zero.

c. Computation of second ceiling aid ratio. The second ceiling aid ratio shall be determined by subtracting from one the product obtained by multiplying eighty per centum by the pupil wealth ratio. This aid ratio shall be expressed as a decimal carried to three places wihtout rounding but shall not be less than zero.

4. Notwithstanding any other provision of this article to the contrary, when a school district operates for a half day session because of a holiday schedule or workshops for teachers, it shall be apportioned with the same amount of state aid for pupils attending kindergarten as if both morning and afternoon kindergarten groups were in attendance although only one kindergarten class attends school. The school district shall provide that morning and afternoon kindergarten groups shall alternate in attendance if more than one half day session is scheduled during the school year.

5. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school, during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the first ceiling aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ratio of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ratio for each such borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year and the school year next succeeding such year.

6. Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approvide [3] expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or

other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building or for lease or other annual payments to another school district pursuant to an agreement made under the provisions of section four hundred three-b of this chapter. In any such case approved expenditures shall be only for new construction, reconstruction, purchase of existing structures, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, or purchase of existing structures.

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction and the purchase of existing structures the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven though nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the costs of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction and the purchase of existing structures may be increased by the ac-

tual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction. The commissioner may waive the provisions of this subparagraph if reconstruction reasonably meets the criteria established for new construction including but not limited to energy, fire, personal safety and space per pupil standards.

b. The apportionment for school building purposes to any district shall be determined by adding the amount of its base year approved expenditures for capital outlays for school building purposes from its general fund, capital fund or from a reserve fund to the amount of its current year approved expenditures for debt service for such purposes and multiplying the sum by its aid ratio; provided, however, that the amount to be so apportioned on account of construction or debt authorized and approved, prior to July first, nineteen hundred sixty-two, reimbursable under the provisions of section three thousand six hundred three-c shall not be less than the sum paid to such district for such school building purposes in the school year ending in nineteen hundred sixty-two, decreased by the amount, if any, that current year debt service is less than the amount of the debt service paid in the school year ending in nineteen hundred sixty-two, or reimbursable under the provisions of section one thousand eight hundred six shall not be less than the amount that otherwise would be receivable under the provisions of such section. For this purpose the amount received by a component district of a central high school district for the school year ending in nineteen hundred sixty-two shall be reduced by the ratio of the debt service of the central high school district assigned to the component district to the sum of such assigned debt service and the debt service of the component district. Any expenditures made for accounting, tabulation, or computer equipment, in excess of ten thousand dollars shall be excluded from building aid unless such expenditures have been specifically approved by the commissioner.

6-a. Additional apportionments of building aid for school districts educating pupils residing on Indian reservations. In addition to the apportionments made to a school district under the provisions of subdivision six of this section, the commission-

er is hereby authorized to apportion to any school district, which the commissioner deems to be providing educational services for a significant number of pupils residing on an Indian reservation, an amount calculated by the commissioner to represent the actual per pupil cost within the cost allowance assigned to Indian pupils as the contribution of the state on behalf of pupils residing on an Indian reservation. Such apportionment shall be payable after approval by the commissioner of final plans for a construction project approved by the commissioner for such purpose. Any such apportionment shall be made upon such terms and conditions as the commissioner shall approve.

7. Apportionment for pupil transportation. a. In addition to the foregoing apportionment, there shall be apportioned to any school district for pupil transportation, ninety percentum of its approved transportation expense for the base year.

b. For the purposes of this apportionment, approved transportation expense shall be the actual expenditure incurred by a school district and approved by the commissioner (i) for those items for which an allowance would be provided under section three thousand six hundred twenty-seven for the transportation of pupils as defined in section three thousand six hundred twenty-one if the district were eligible for transportation quota state aid under part two of this article, and (ii) for the transportation required or authorized pursuant to article eighty-nine, and (iii) for regional or joint transportation systems operated by school districts or boards of cooperative educational services. Approved transportation expense shall include employers' social security contributions for transportation personnel.

c. Approvable expenses for the purchase of school buses shall be limited to the actual purchase price, or the expense as if the bus were purchased under state contract, whichever is less. If the commissioner determines that no comparable bus was available under state contract at the time of purchase, the approvable expenses shall be the actual purchase price or the state wide median price of such bus in the most recent base year in which such bus was sold, whichever is less. Such median shall be computed by the commissioner for the purposes of this subdivision.

d. Total gross expenditures for transportation, except for transportation required or authorized pursuant to article eighty-nine, for the school year nineteen hundred seventy-eight–nineteen hundred seventy-nine and thereafter shall not exceed such gross expenditures for the prior year by more than seven percentum except as such expenditures may be excluded from

such limit pursuant to regulations adopted by the commissioner and approved by the director of the budget. Such exceptions may include but shall not be limited to purchases of school buses without issuance of bonds or notes and additional transportation required because of the closing of school buildings and payments for social security taxes.

e. Apportionments for transportation, except for transportation required or authorized pursuant to article eighty-nine, for the school year nineteen hundred seventy-eight–nineteen hundred seventy-nine and thereafter shall not exceed such apportionments for the prior year by more than seven percentum, except as such apportionments may be excluded from such limit pursuant to regulations adopted by the commissioner and approved by the director of the budget. Such exceptions may include but shall not be limited to purchases of school buses without issuance of bonds or notes and additional transportation required because of the closing of school buildings and payments for social security taxes.

8. Computation of total aidable pupil units for operating aid. A district's total aidable pupil units for the purpose of computing operating aid shall be the sum of the district's adjusted average daily attendance computed pursuant to this section; plus for aid payable in the school year nineteen hundred eighty-nineteen hundred eighty-one the attendance as defined by the commissioner of those pupils in private schools pursuant to section forty-four hundred two of this chapter plus the additional aidable pupil units computed for the base year under subdivision nine of this section. In such computation school districts may, with the commissioner's approval, exclude attendance for those days on which school attendance was adversely affected because of an epidemic or because of a religious holiday as provided in paragraph b of subdivision two of this section. For the purposes of computing operating aid a district may use either total aidable pupil units for the base year or the average of total aidable pupil units for the base year and the year prior to the base year, using the same pupil populations for the year prior to the base year as for the base year and using the base year definitions of total aidable pupil units in both years.

9. Additional aidable pupil units. a. The additional aidable pupil units used to compute total aidable pupil units pursuant to subdivision eight of this section shall be computed as follows: The attendance of pupils with special educational needs shall be multiplied by twenty-five per centum, the attendance of summer

session pupils shall be multiplied by twelve per centum, and the attendance of evening school pupils shall be multiplied by fifty per centum. The sum of such products shall constitute the additional aidable pupil units. Nothing contained in this subdivision shall be construed to result in the inclusion of the attendance of summer session or evening school pupils in the computation of weighted or adjusted average daily attendance pursuant to subdivision two of this section.

b. For the computation of total wealth pupil units the determination of the number of pupils with special educational needs shall use all wealth pupil units, excluding additional aidable pupil units. Only resident pupils shall be used for computation of wealth units. For aid payable in the school year nineteen hundred eighty–eighty-one additional total wealth pupil units for the handicapped shall be computed on the basis of the law in effect prior to July first, nineteen hundred eighty. For aid payable in the school years nineteen hundred eighty-one–eighty-two and thereafter such total wealth pupil units shall include weighted pupils with handicapping conditions with the attendance of private school pupils with handicapping conditions under section forty-four hundred two assigned an additional weighting of one hundred seventy percent.

9–a. Secondary school weighting. There shall be added to the total aidable pupil units computed in subdivision eight of this section a number obtained by multiplying by twenty-five per centum the adjusted average daily attendance in grades seven through twelve excluding attendance of pupils who receive a weighting for handicapping conditions, except those for whom weighting is provided in clause (three) of subparagraph b of paragraph one of subdivision nineteen of this section, and excluding the attendance of pupils for whom the district has received any additional apportionment attributable to subdivision seventeen of this section. Only resident secondary pupils shall be used for computation of wealth units.

10. a. Program approval requirements. Any school district receiving an apportionment partially attributable to the weightings provided in subdivision nine of this section for pupils with special educational needs or for pupils with handicapping conditions and any school district receiving an additional apportionment pursuant to subdivision nineteen of this section for handicapped pupils or to subdivision seventeen of this section for pupils in occupational education programs shall use the total apportionment attributable to such pupils for locally administered

programs for such pupils in accordance with regulations issued by the commissioner. Such regulations shall provide for the use of such apportionment in the manner determined by the commissioner to be the most educationally advantageous for such pupils; and such regulations shall also include annual district reporting requirements which shall require the identification of such pupils, a statement describing the expenditure of the preceding year's apportionment for such pupils and an evaluation of the results obtained from such expenditures. A district which spends any part of its total annual apportionment attributable to such pupils in an unauthorized manner in the base year shall have its current year apportionment reduced by the amount of such unauthorized expenditures in the base year.

b. District plans. Any school district receiving an apportionment partially attributable to the weightings provided in subdivision nine of this section for pupils with special educational needs or for pupils with handicapping conditions and any school district receiving an additional apportionment pursuant to subdivision nineteen of this section for handicapped pupils or to subdivision seventeen of this section for pupils in occupational education programs shall, prior to September first, nineteen hundred seventy-four and every third year thereafter, submit to the commissioner an acceptable plan describing the expected use of such apportionment and the expected impact of the proposed plan. Such plan shall be in a form prescribed by the commissioner, and except as heretofore provided, shall have the content prescribed by the commissioner. The commissioner may, from time to time, require amendments of such plans when he deems such amendments to be necessary and appropriate to further the educational welfare of the pupils involved.

11. Operating expense aid. The apportionment to any school district hereunder shall be computed as follows: a. The apportionment to any school district for operating expense shall be based upon the total expenditures from its general fund and from its capital fund during the base year as approved by the commissioner, and in accordance with the classification of expenditures in use by the commissioner for the reporting by school districts of receipts, expenditures and other financial data. For the purpose of this subdivision operating expense shall be defined as total cash expenditures during the base year, but shall exclude: (1) any balances and transfers; (2) any payments for transportation of pupils to and from school once daily during the regular school year inclusive of capital outlays and

debt service therefor; (3) any payments for capital outlay and debt service for school building purposes, provided, however, that in the case of a school district which has entered into a contract with state university pursuant to paragraph *o* of subdivision two of section three hundred fifty-five of this chapter, under which the school district makes payments to state university on account of capital outlay relating to certain children residing in such school district, such payments shall not be so excluded; (4) any payments for cafeteria or school lunch programs; (5) any proceeds of short term borrowings in the general fund and any payments from the proceeds of the sale of obligations in the capital fund; (6) any cash receipts which reduce the cost of an item when applied against the expenditure therefor, except gifts, donations and earned interest and any refunds made; (7) any payments made to boards of cooperative educational services and to county vocational education and extension boards for purposes or programs for which an apportionment is paid pursuant to other sections of this chapter, except that payments attributable to eligible handicapped pupils and ineligible pupils residing in noncomponent districts shall be included in operating expense; (8) any tuition payments made to other school districts inclusive of payments made to a central high school district by one of its component school districts; (9) any apportionment or payment received from the state for experimental or special programs paid under provisions other than those found in this section; (10) any funds received from the federal government; provided, however, that there shall be excluded from such federal funds or other apportionments any payments from such funds already deducted pursuant to this paragraph; (11) any payments made for which an apportionment is disallowed pursuant to regulations of the commissioner; (12) any expenditures made for accounting, tabulation, or computer equipment, in excess of ten thousand dollars unless such expenditures shall have been specifically approved by the commissioner; (13) any rentals received pursuant to the provisions of section four hundred three-a of this chapter.

[b to f. Repealed.]

12. Computation of operating expense aid. a. Apportionment to school districts for operating expense shall be the higher of (1) the sum of the apportionments computed pursuant to paragraphs b and c of this subdivision or (2) the apportionment computed pursuant to paragraph d of this subdivision.

b. Computation of aid under the first ceiling (sixteen hundred dollars). The apportionment to any school district hereunder shall be determined by multiplying sixteen hundred dollars by the first ceiling aid ratio with the product multiplied by the district's total aidable pupil units.

c. Computation of aid under the second ceiling. The apportionment to any school district hereunder shall be determined by multiplying one hundred dollars by the second ceiling aid ratio with the product multiplied by the district's total aidable pupil units.

d. The apportionment to a school district may not be less than the amount computed by multiplying its total aidable pupil units by the sum of three hundred sixty dollars and the product of one-thousandth of the difference between one hundred one thousand dollars and the actual valuation of such district divided by its total wealth pupil units for the year prior to the base year; provided, that any negative remainder resulting from the subtraction of such actual valuation per total wealth pupil units from one hundred one thousand dollars shall be counted as zero.

13. Growth aid. a. The provisional growth index of a school district to be used in determining its apportionment for operating expenses shall be computed by dividing the average daily attendance of the district as computed in paragraph d of subdivision one of this section for the first attendance reporting period of the current year by such attendance for the first such period of the base year and expressing the result as a percentage, carried to one decimal place without rounding; provided that if the commissioner determines that the first attendance period in either the current year or the base year does not reasonably reflect the average daily attendance of the district because of energy shortages, epidemics, teacher strikes or other such emergencies the next succeeding attendance period not so affected by such occurrences shall be used in computing the district's growth index in each such year. A district's final growth index for the current year shall be calculated at the end of such year by dividing the district's average daily attendance for the current year by such attendance for the base year and expressing the result as a percentage, carried to one decimal place without rounding; provided, however, that in calculating such final growth index a district shall exclude the aggregate attendance and days of session of those days when the district experienced an energy shortage, an epidemic, a teacher strike or another such emergency as determined by the commissioner.

b. Any district having a provisional growth index in excess of one hundred per centum shall be paid an additional amount in the current year determined by multiplying such excess by the amount computed pursuant to subdivisions eleven or twelve; provided, that a district's total apportionment computed under subdivisions eleven and thirteen or twelve for the ensuing year shall be adjusted so that the final additional apportionment paid pursuant to this subdivision equals an apportionment computed by multiplying the amount by which the district's final growth index exceeds one hundred per centum by the total apportionment for the current year computed pursuant to subdivisions eleven or twelve.

14. Limitations on the apportionment. The apportionment to any school district during any school year shall be subject to the following provisions:

a. District subject to reorganization. (1) No apportionments pursuant to subdivision six of this section shall be paid to any school district which is scheduled for reorganization pursuant to the state plan for school district reorganization, unless there shall have been compliance with this paragraph.

(2) In order to obtain an apportionment under subdivision six of this section for a district scheduled for reorganization and not reorganized, such district shall file with the commissioner a formal written application therefor, (a) showing (i) inadequacy or obsolescence of present facilities, and (ii) that such construction for which such apportionment is sought would be capable of substantial educational use by the reorganized district in case the reorganization under the existing plan of reorganization is effected, and that it will provide more efficient and more economical educational facilities for such reorganized district in the best educational interests of the children in the reorganized school district or (b) showing that such district has adopted a resolution or resolutions in accordance with sections eighteen hundred one through eighteen hundred three of this chapter in favor of such reorganization and is being prevented from reorganizing by the action of another district which is part of the same plan of reorganization. The commissioner shall within ninety days grant such apportionment or deny such apportionment with leave to the district to petition for a formal hearing. Such hearing shall be held pursuant to the procedures provided in subdivision three of section three hundred fourteen of this chapter.

(8)(a) Within sixty days after such hearing is concluded and all papers in relation thereto are submitted, the commissioner shall render a preliminary finding recommending whether a change is warranted, setting forth his findings and conclusions which shall be based exclusively on the evidence presented at the hearing. The commissioner shall recommend the amendment or confirmation of the state plan in accordance with his preliminary finding by a report made by him and entered in his office. The commissioner shall serve a copy of such preliminary finding upon the clerk or in the event that there is no clerk, the trustee or trustees of the school districts located in the affected area or areas. In the event that such districts do not agree with such preliminary findings, the school districts affected by the terms of such preliminary finding may within thirty days apply to the chancellor of the board of regents for the appointment of a committee of the regents to review the proposed amendment or confirmation of the state plan. In the event that an application to the chancellor is not made within thirty days for the appointment of a committee of the regents, the preliminary finding shall become an order without further action of the commissioner.

(b) Upon receipt of such application, the chancellor shall appoint a committee of three members of the regents, one of whom shall be a regent whose judicial district includes all or part of the areas affected. The committee of regents shall review the proposed amendment or confirmation of the state plan. In the event the committee is unable to resolve the differences between the commissioner and such school districts, it shall within sixty days from the date of the appointment of such committee, make an order reversing, affirming, or modifying, wholly or in part, such preliminary finding of the commissioner and amending or confirming the state plan setting forth the committee's findings and conclusions which shall be based exclusively on the evidence presented at the commissioner's hearing and any additional evidence presented at the committee's review. The committee shall have the discretion to permit additional evidence to be presented by any party. The commissioner shall serve a copy of such order upon the clerk or in the event there is no clerk, the trustee or trustees of the school districts located in the affected area or areas.

(c) Such order of the committee of the regents shall be binding and final and subject to review pursuant to article seventy-eight of the civil practice law and rules. The scope of review

shall include the question whether the determination is on the entire record supported by substantial evidence.

(d) The commissioner shall establish and promulgate rules of practice and procedures in connection with such hearings, shall provide for the attendance of the hearing officer, regulate the course of the hearing, fix the time for filing of briefs and other documents, provide a hearing stenographer and for the making of a record as well as the making of a full transcript of all proceedings at the hearing and shall at the request of any party, school district or interested person have prepared and furnish a copy of the transcript or any party ' thereof upon payment of the costs therefor.

(e) School districts designated in the established plan by an order of the committee of the regents shall be made parties by the petitioning district. Districts which may be affected by the proposed change may join or be joined in such proceeding by the commissioner or any party.

(4) Notwithstanding the provisions of subparagraphs one through three of this paragraph, any such district which has qualified for an apportionment for school building purposes, under laws in effect prior to the date this act takes effect, shall receive an apportionment under subdivision six of this section; and provided, further, that no new apportionment shall be paid and the commissioner shall not approve any new expenditures for school building purposes in any such district after such date, except where the commissioner has made a determination as herein provided.

(5) Nothing herein provided shall prevent a school district which has heretofore been denied an apportionment subsequent to July first, nineteen hundred sixty-two from making an application hereunder, except that any such apportionment which may be granted shall not be retroactive beyond July first, nineteen hundred sixty-two.

b. Local effort check. If the local revenue provided by any school district in the current year, inclusive of its local nonproperty tax receipts, is less than the amount which could be raised by a tax of fifteen dollars per thousand on actual valuation as defined pursuant to paragraph c of subdivision one of this section except that the assessed valuation shall be as it appears on the assessment roll for the calendar year in which the base year commenced and such school district has approved operating expenses for the base year of at least twelve hundred dollars per total aidable pupil units computed without the dis-

trict's additional aidable pupil units, the apportionment to the district for the current year shall be reduced by the amount by which the local revenue is exceeded by the amount which could have been raised by such tax rate; provided, however, that revenue raised by a component district for a central high school district shall be deemed revenue of such component district and this provision shall apply to such component district only; provided, further, that such reduction shall not be applied to central high school districts, or a district raising less than fifteen percent of its revenues, excluding state apportionments or payments, by local levy, or operating an institutional school. For the purposes of this paragraph and for the school year nineteen hundred seventy-five–seventy-six only, such assessed valuation shall be for the calendar year immediately preceding the calendar year in which the base year commenced and approved operating expenses shall be those incurred in the year immediately preceding the base year.

c. Notwithstanding the provisions of this section, whenever two or more school districts are scheduled for reorganization pursuant to section three hundred fourteen of this chapter and whenever after July first, nineteen hundred sixty-five all such school districts so scheduled do reorganize, and (1) whenever such proposed reorganization includes at least two school districts, each of which maintains its own high school, or (2) where such proposed reorganization includes only one school district maintaining its own high school, whenever in such case such proposed reorganization, in addition to such school district maintaining its own high school, includes at least nine other school districts, or (3) whenever such proposed reorganization includes at least two central school districts, or (4) where such proposed reorganization includes at least one school district maintaining its own high school and, in addition thereto, includes at least one school district employing eight or more teachers, or (5) where such proposed reorganization includes a city school district, and in addition thereto, includes at least seven other school districts, beginning with July first, nineteen hundred sixty-five or the first school year of operation as a reorganized district after such date, such reorganized school district shall be entitled to an additional apportionment of twenty-five per centum of its apportionment as provided in subdivision six of this section whenever such apportionment is computed on the basis of its approved base year expenditures for capital outlay from its general capital or reserve fund and current years approved expenditures for debt services for school building pur-

poses, the general contracts for which shall have been awarded on or after the date this act takes effect and prior to July first, nineteen hundred eighty-one or within ten years from the effective date of reorganization, whichever is later as provided in subdivision six of this section, and which said sum shall be payable for and during the terms of any indebtedness created for the purpose of financing such construction or other facility as aforesaid, provided however, that in no event may the total apportionment under this paragraph and under subdivision six of this section for any project exceed ninety-five per cent of the sum of the base year approved expenditures for capital outlay for school building purposes from the general fund, capital fund or from a reserve fund, and current year approved expenditures for debt service for such purposes for such project. Notwithstanding any provisions of paragraphs c and d of this subdivision to the contrary, the commissioner is hereby authorized, in addition to any other state aid apportionments to which such district may be entitled under the provisions of this chapter, to make the additional reorganization incentive aid payments provided by such paragraphs c and d of this subdivision, in the amounts, and in the manner provided therein, to central school district number one of the towns of Brookhaven and Smithtown, Suffolk county, as if such newly reorganized district were included in the various categories of reorganization referred to in such paragraphs. In the event a school district is eligible for incentive building aid and again reorganizes pursuant to a new plan of reorganization established by the commissioner, and where such new reorganization shall again become eligible for incentive building aid, no project of such district shall be entitled to more than one such additional twenty-five percent apportionment.

d. Notwithstanding the provisions of paragraphs a through c of this subdivision, whenever two or more school districts are scheduled for reorganization pursuant to section three hundred fourteen of this chapter, and whenever after July first, nineteen hundred sixty-five, all such school districts so scheduled do reorganize in accordance with the provisions of such section three hundred fourteen as amended by this act, and (1) whenever such proposed reorganization includes at least two school districts, each of which maintains its own high school, or (2) where such proposed reorganization includes only one school district maintaining its own high school, whenever in such case such proposed reorganization, in addition to such school district maintaining its own high school, includes at least nine other school districts, or (3) whenever such proposed reorganization

includes at least two central school districts, or (4) where such proposed reorganization includes at least one school district maintaining its own high school and, in addition thereto, includes at least one school district employing eight or more teachers, or (5) where such proposed reorganization includes a city school district, and in addition thereto, includes at least seven other school districts, such reorganized district shall be entitled to an additional apportionment equal to ten per cent of the apportionment computed in accordance with the provisions of subdivision twelve of this section; but in no case shall the sum of such apportionment under this paragraph plus the apportionment under subdivision twelve of this section be more than a total of ninety-five per centum of base year operating expense, for a period of five years beginning with the first school year of operation as a reorganized district; and thereafter such additional ten per cent apportionment to such district shall be reduced by one percentage point each year, beginning with the sixth school year of operation as a reorganized district, and continuing until such additional ten per cent apportionment is eliminated; provided, however, that the total apportionment to such reorganized district, beginning with the first school year of operation as a reorganized district, and thereafter, shall be not less than the sum of all apportionments which each component school district was entitled to receive and did receive during the last school year preceding such first year of operation. In the event a school district is eligible for incentive operating aid and again reorganizes pursuant to a new plan or reorganization established by the commissioner, and where such new reorganization is again eligible for incentive operating aid, the newly created school district shall be entitled to receive incentive operating aid pursuant to the provisions of this paragraph, based on all school districts included in any such reorganization, provided, however, that incentive operating aid payments due because of any such former reorganization shall cease.

e. Notwithstanding the provisions of paragraphs a through d of this subdivision, whenever two or more school districts were scheduled for reorganization pursuant to section three hundred fourteen of this chapter and whenever, between July first, nineteen hundred sixty-two and July second, nineteen hundred sixty-five, all such school districts so scheduled did reorganize and (1) whenever such reorganization included at least two school districts, each of which maintained its own high school, or (2) where such reorganization included only one school district maintaining its own high school, whenever in such case such

reorganization, in addition to such school district maintaining its own high school, included at least nine other school districts, or (3) whenever such reorganization included at least two central school districts, or (4) where such reorganization included at least one school district maintaining its own high school and, in addition thereto, included at least one school district employing eight or more teachers, or (5) where such reorganization included a city school district, and in addition thereto, included at least seven other school districts, the reorganized district, beginning with July first, nineteen hundred sixty-six, shall be entitled to an additional apportionment of twenty-five per centum of its apportionment as provided in subdivision six of this section whenever such apportionment is computed on the basis of its approved base year expenditures for capital outlay from its general, capital or reserve fund and current year's approved expenditures for debt services for school building purposes, the general contracts for which shall have been awarded after July first, nineteen hundred sixty-two and prior to July first, nineteen hundred seventy-two, and which said sum shall be payable for and during the terms of any indebtedness created for the purpose of financing such construction or other facility as aforesaid, provided, however, that in no event may the sum of the building aid apportionment under this paragraph plus the apportionment under subdivision six for any project exceed ninety-five per cent of the sum of the base year approved expenditures for capital outlay for school building purposes from the general fund, capital fund or from a reserve fund, and current year approved expenditures for debt service for such purposes for such project; in the event a school district is eligible for incentive building aid under this paragraph and again reorganizes pursuant to a new plan of reorganization established by the commissioner, and where such new reorganization shall again become eligible for incentive building aid, no project of such district shall be entitled to more than one such additional twenty-five percent apportionment; and provided further that such reorganized district, notwithstanding the provisions of paragraphs a through d of this subdivision, shall, beginning with July first, nineteen hundred sixty-six, be entitled to an additional apportionment equal to ten percent of the apportionment computed pursuant to subdivision twelve of this section, but in no case shall the sum of apportionment under this paragraph plus the apportionment under subdivision twelve of this section exceed ninety-five per centum of the base year operating expense for a period of five years, beginning with July first, nineteen hundred sixty-six; and thereafter

such additional ten percent apportionment shall be reduced by one percentage point each year, until such additional ten percent apportionment is eliminated.

15. Borough aid. a. The city school district of the city of New York may use either the total aidable pupil units or the total wealth pupil units of such city school district computed in accordance with the provisions of this section or as though each such borough were a separate city school district, provided that any special services apportionment for occupational education made pursuant to subdivision seventeen of this section or building aid shall be calculated on the basis of the resident weighted average daily attendance of the city school district as a whole. All pupils attending schools in a borough shall be deemed to reside in such borough.

b. In computing operating expense aid to the city school district of the city of New York, such district may elect to receive such aid computed on a city-wide basis, or as though each borough were a separate city school district. If aid is paid on a borough basis, such city school district shall file with respect to each borough, all reports required by the commissioner. The amount included in such reports relating to operating expense and including general overhead and administration in each borough shall be such proportion of the amount expended from general overhead and administration for the entire city-wide school district as the total aidable pupil units of such borough bears to the sum of the total aidable pupil units for all boroughs.

16. High tax aid. a. A school district with a local tax rate of greater than twenty mills computed by dividing such district's total revenues from real property and non-property tax levies for the base year levied for school purposes exclusive of library purposes and exclusive of any balances remaining in the general fund of the district at the end of the base year, unless approved by the commissioner, divided by such district's actual valuation for the school year prior to the base year, shall receive an additional apportionment in the current school year.

b. If the base year approved operating expense per base year total aidable pupil unit of such district exceeds those of eighty percent of the districts in the state as determined by the commissioner and based on such expense for the year prior to the base year with adjustments, such tax rate for the purposes of this subdivision shall be multiplied by such state eightieth percentile expense per pupil unit and divided by the district's approved operating expense per total aidable pupil unit and such adjusted

tax rate shall be used for the purpose of determining eligibility for high tax aid under the provisions of this subdivision. For the school year commencing July first, nineteen hundred seventy-nine such eightieth percentile expense per pupil shall be twenty-three hundred fifty dollars. For the school year commencing July first, nineteen hundred eighty such eightieth percentile expense per pupil shall be twenty-five hundred dollars.

[c. Repealed.]

d. The maximum tax rate that may be used for the purpose of computing aid under the provisions of this subdivision shall be forty mills.

e. Twenty mills shall be subtracted from the adjusted tax rate and the difference will be divided by twenty mills to produce the high tax aid percentage which shall be expressed as a percentage to one decimal rounded.

[f. Repealed.]

g. High tax aid shall be computed by multiplying such high tax aid percentage by one minus the pupil wealth ratio by three hundred sixty-five dollars by the district's total aidable pupil units for operating aid purposes.

h. Notwithstanding the foregoing provisions of this subdivision a school district may elect to receive in the school year commencing July first, nineteen hundred eighty the higher of either (i) the total high tax aid due and payable in the base year of (ii) the amount of aid due and payable in the current school year pursuant to the provisions of this subdivision.

i. For the school year commencing July first, nineteen hundred eighty, and thereafter, any school district which maintained a home school for grades kindergarten through nine, during the school year nineteen hundred seventy-nine–nineteen hundred eighty, which has indicated to the commissioner of education that it is willing to reorganize, although no district has been willing to join in reorganization with such district and which had a tax rate for high tax aid purposes during the school year nineteen hundred seventy-nine–nineteen hundred eighty under the provisions of this subdivision and which was above the ninetieth percentile for tax rates of all school districts in this state shall, notwithstanding the provisions of this subdivision, be entitled to receive an additional high tax aid computed by multiplying the district's total aidable pupil units for operating aid purposes by three hundred sixty-five dollars. Aid paid under this paragraph will not be part of the base used to com-

pute high tax aid in any subsequent school year under the provisions of this subdivision.

17. Special services aid for large city school districts. a. The city school districts of those cities having populations in excess of one hundred twenty-five thousand shall be entitled to an apportionment under the provisions of this section.

b. There shall be apportioned to such city school districts for pupils in grades ten through twelve in attendance in occupational education programs as such programs are defined by the commissioner, subject for the purposes of this paragraph to the approval of the director of the budget, an amount for each such pupil to be computed by subtracting from fourteen hundred dollars the amount obtained when fifteen-thousandths is multiplied by the district's actual valuation as defined in paragraph c of subdivision one of this section divided by the resident weighted average daily attendance for such district as defined in this section. Such aid will be payable for pupils attending occupational education programs operated by the school district and for pupils for whom such school district contracts with boards of cooperative educational services to attend occupational education programs operated by a board of cooperative educational services. Children with handicapping conditions for whom aid under another provision of this chapter is claimed other than on the basis of average daily attendance, may not be used in computing aid under this paragraph.

18. a. Minimum apportionment. For the school year commencing July first, nineteen hundred eighty a district may elect to receive the higher of (1) the apportionment computed under subdivisions twelve and thirteen of this section for the current year or (2) the apportionment computed under the provisions of subdivisions twelve and thirteen of this section for the current year and the special aid which shall be computed for the year nineteen hundred eighty-eighty-one by multiplying the operating aids base by one hundred eight percent by the total aidable pupil units for the base year (multiplied by the current year growth index, if greater than one) and dividing the product by the total aidable pupil units for the year prior to the base year (multiplied by the base year growth index, if greater than one) using the base year definition of total aidable pupil units for both years and subtracting from the result the aid payable under the provisions of subdivisions twelve and thirteen for the current year; in no event may the special aid so computed, when added to the aid payable under the provisions of subdivisions

twelve and thirteen for the current year exceed the operating aids base.

b. Notwithstanding the provisions of this subdivision, any district which has an operating aids base greater than the amount computed under the provisions of paragraph a of this subdivision may elect to receive the operating aids base, in the current year.

c. Maximum apportionment for the school year commencing July first, nineteen hundred eighty. No school district may receive under the provisions of subdivisions twelve, thirteen, and eighteen more than one hundred thirteen percent of its operating aids base or one hundred thirteen percent of its operating aids base multiplied by the total aidable pupil units for the base year (multiplied by the current year growth index, if greater than one) and dividing the product by the total aidable pupil units for the year prior to the base year (multiplied by the base year growth index, if greater than one) using the base year definition of total aidable pupil units for both years.

d. A city school district in a city having a population of more than one million may compute its operating aid under subdivision twelve of this section for each borough and take the sum of such amounts subject to the limits in paragraph c of this subdivision; but if aid is not selected for every borough under subdivision twelve of this section, then the limits in paragraph c of this subdivision must be imposed by each borough.

e. Aid under this section shall be paid during the school year commencing July first, nineteen hundred eighty notwithstanding the provisions of paragraph b of subdivision fourteen of this section.

19. Excess cost aid for pupils with handicapping conditions. 1. Definitions. For the purpose of this subdivision the following terms will have these meanings:

a. "Pupils with handicapping conditions" shall mean pupils who are trainable mentally retarded, educable mentally retarded, visually impaired, hearing impaired, physically handicapped, speech impaired, emotionally disturbed, autistic, or learning disabled, as such terms are defined by the commissioner and who receive special educational services or attend programs which meet criteria established by the commissioner, operated by a district or by a board of cooperative educational services, whether or not the district is a component of such board.

b. "Weighted pupils with handicapping conditions" shall be the attendance of pupils during the base year in programs approved in accordance with the provisions of article eighty-nine of this chapter in public schools and boards of cooperative educational services and shall be computed as follows:

(1) The attendance of pupils who have been found by a committee on the handicapped either to require placement for sixty per centum or more of the school day in a special class, or to require home or hospital instruction for a period of more than sixty days, or to require special services or programs for more than sixty per centum of the school day shall be multiplied by one and seven tenths;

(2) The attendance of pupils who have been found by a committee on the handicapped to require placement for twenty per centum or more of the school week in a resource room or to require special services or programs for twenty per centum or more of the school week shall be multiplied by nine tenths;

(3) The attendance of pupils who have been found by a committee on the handicapped to require two or more periods a week of special instruction either in speech or in another special program or services, shall be multiplied by thirteen hundredths.

(4) Such attendance of pupils with handicapping conditions, as such term is defined in section forty-four hundred five of this chapter, shall be computed in accordance with regulations of the commissioner. Such attendance for the school year nineteen hundred eighty–nineteen hundred eighty-one for a city school district in a city having a population of more than one million, shall be computed by the commissioner using as a base attendance for the months of April, May and June, nineteen hundred eighty, computed under the provisions of paragraph c of subdivision three of section forty-four hundred five of this chapter. No pupil may be counted more than once.

c. "Expense per pupil" shall mean approved operating expense for the base year divided by the sum of the total aidable pupil units plus weighted pupils with handicapping conditions, including pupils contracted for under section forty-four hundred two of this chapter assigned an additional weighting of one hundred seventy percent, plus, for the school year nineteen hundred eighty–nineteen hundred eighty-one the attendance of pupils with handicapping conditions attending special classes in boards of cooperative educational services and not specifically included in attendance otherwise. Expense per pupil shall be not less than the first tier operating aid ceiling and not more than the

statewide average of such expense per pupil rounded up to the nearest fifty dollars as computed by the commissioner for such year by January first of such year in accordance with regulations of the commissioner. For aid payable in the school year nineteen hundred eighty–nineteen hundred eighty-one such statewide average shall be twenty-one hundred dollars.

d. "Resident weighted pupils with handicapping conditions" shall mean weighted pupils with handicapping conditions minus the nonresident weighted pupils with handicapping conditions plus the resident weighted pupils with handicapping conditions to whom special services or programs are provided by another public school district.

2. Excess cost aid ratio. Such ratio shall be the first ceiling aid ratio used for operating aid, but not less than twenty-five percent.

3. Excess cost aid per pupil shall equal the product of the excess cost aid ratio and the expense per pupil.

4. Excess cost aid for the school year nineteen hundred eighty–nineteen hundred eighty-one shall equal the product of the excess cost aid per pupil and the weighted pupils with handicapping conditions; commencing July first, nineteen hundred eighty-one and thereafter such aid shall equal the product of the excess cost aid per pupil and the resident weighted pupils with handicapping conditions.

5. A school district having a pupil with a handicapping condition for whom the cost, as approved by the commissioner, of appropriate special services or programs exceeds the lesser of ten thousand dollars or four times the expense per pupil without limits shall be entitled to an additional apportionment for each such child computed by multiplying the district's excess cost aid ratio by the amount by which such cost exceeds three times the district's expense per pupil without limits.

20. Low-income supplemental school aid. A school district shall receive an award based upon the following apportionment: a base grant of seven dollars, multiplied by the district's income ratio, multiplied by the district's total aidable pupil units as defined in this section.

a. For the purposes of this subdivision, the income ratio shall be computed by dividing New York state's adjusted gross income for the calendar year prior to the calendar year in which the base year began by the state's year prior to the base year total wealth pupil units as defined in this section, used to compute

the pupil wealth ratio for the current school year, the quotient of which shall be divided by the quotient of the district's adjusted gross income for such calendar year divided by the district's total wealth pupil units for the year prior to the base year as defined in this section, carried to three decimal places without rounding. For aid payable in the school year nineteen hundred eighty–nineteen hundred eighty-one the New York state adjusted gross income per total wealth pupil units, for the purpose of this subdivision, is twenty-nine thousand one hundred dollars.

b. For the purposes of this subdivision, the income data for the income ratio shall be computed in accordance with regulations adopted by the state tax commission based upon personal income tax returns for the calendar year two years prior to the calendar year in which the current school year commences.

c. For the purposes of this subdivision, New York city will be eligible for aid only on a borough basis.

21. In addition to apportionments under subdivision eighteen of this section, each school district shall be entitled to an amount computed by multiplying by eight dollars the portion of the base year adjusted average daily attendance of such school district represented by pupils in grades kindergarten through three. Where the district used an average of its total aidable pupil units to compute operating aids, an average of the applicable attendance will be used for the purpose of this subdivision, except that for aid in the school year nineteen hundred eighty–nineteen hundred eighty-one only the adjusted average daily attendance for the school year nineteen hundred seventy-nine–nineteen hundred eighty shall be used. Such aid will be provided to such districts for the purpose of performing diagnostic screening as described in section thirty-two hundred eight of this chapter.

Added L.1962, c. 657, § 3; amended L.1963, c. 270; L.1963, c. 610, §§ 1, 2; L.1963, c. 760, § 3; L.1963, c. 777, §§ 1–5; L.1963, c. 982; L.1964, c. 762; L.1964, c. 885, § 1; L.1965, c. 83, §§ 1–4; L.1965, c. 561, § 2; L.1965, c. 745, §§ 4, 5; L.1965, c. 1002, §§ 1–3; L.1966, c. 474, §§ 1, 2; L.1966, c. 767, §§ 1–5; L.1966, c. 855; L.1966, c. 999, § 2; L.1967, c. 449; L.1968, c. 685, §§ 1–5, 9; L.1969, c. 183, §§ 2, 4, 5, 11–16; L.1969, c. 937, § 2; L.1970, c. 122, §§ 1–3, 5, 7, 10, 11, 13, 17, 19, 22; L.1970, c. 234, § 1; L.1970, c. 730; L.1970, c. 829, § 1; L.1970, c. 1021; L.1971, c. 754, §§ 2, 3, 9, 13, 15, 16; L.1971, c. 847, § 7; L.1971, c. 931, § 3; L.1971, c. 958; L.1971, c. 976; L.1972, c. 64, §§ 1, 2; L.1972, c. 236, § 1; L.1972, c. 414, §§ 7, 10; L.1972, c. 436, §§ 1, 2; L.1972, c. 553, §§ 1–3, 9, 10, 12; L.1972, c. 571, § 2; L.1973, c. 527, § 1; L.1973, c. 587, §§ 1–3, 9, 10; L.1973, c. 689, §§ 1, 2; L.1973, c. 960, § 1; L.1974, c. 241, §§ 1–5, 7, 8, 10–15; L.1974, c. 569, §

1; L.1974, c. 665, §§ 2, 3; L.1974, c. 718, §§ 3–6; L.1974, c. 962, § 1; L.1975, c. 399, §§ 1–4, 6, 7, 11, 12; L.1975, c. 792, § 1; L.1976, c. 131, §§ 1, 2; L.1976, c. 853, § 7; L.1977, c. 71, §§ 1, 6, 7; L.1977, c. 472, § 1; L.1978, c. 74, §§ 1–9, 13; L.1978, c. 410, §§ 1, 2; L.1978, c. 550, § 21; L.1978, c. 593, §§ 1, 2; L.1978, c. 786, §§ 3–5, 7–9, 11; L.1979, c. 53, §§ 4 to 17; L.1979, c. 182, § 1; L.1979, c. 288, §§ 1–13, 16–22; L.1979, c. 367, § 5; L.1980, c. 53, §§ 6 to 21; L.1980, c. 678, §§ 1–4, 6; L.1980, c. 877, § 14.

[1] So in original. Probably should be "shall."
[2] So in original. Probably should be "without."
[3] So in original. Probably should be "approved".
[4] So in original. Probably should read "part."

AMENDMENT OF SUBDIVISION 5, PAR. A

Subdivision 5, par. a, was amended by L.1974, c. 665, § 3, eff. July 1, 1974, which redesignated cl. (12) added by L.1972, c. 571, § 2, as (13), and added cl. (14), without reference to the prior repeal of subd. 5 by L.1974, c. 241, § 1, eff. July 1, 1974. Said par. a, as amended, provides:

a. The apportionment to any school district for operating expense shall be based upon the total expenditures from its general fund and from its capital fund during the base year as approved by the commissioner, and in accordance with the classification of expenditures in use by the commissioner for the reporting by school districts of receipts, expenditures and other financial data. For the purpose of this subdivision operating expense shall be defined as total cash expenditures during the base year, but shall exclude: (1) any balances and transfers; (2) any payments for transportation of pupils to and from school once daily during the regular school year inclusive of capital outlays and debt service therefor; (3) any payments for capital outlay and debt service for school building purposes, provided, however, that in the case of a school district which has entered into a contract with state university pursuant to paragraph o of subdivision two of section three hundred fifty-five of this chapter, under which the school district makes payments to state university on account of capital outlay relating to certain children residing in such school district, such payments shall not be so excluded; (4) any payments for cafeteria or school lunch programs; (5) any proceeds of short term borrowings in the general fund and any payments from the proceeds of the sale of obligations in the capital fund;

(6) any cash receipts which reduce the cost of an item when applied against the expenditure therefor, except gifts, donations, and earned interest and any refunds made; (7) any payments made to boards of cooperative educational services and to county vocational education and extension boards for purposes or programs for which an apportionment is paid pursuant to other sections of this chapter; (8) any tuition payments made to other school districts inclusive of payments made to a central high school district by one of its component school districts; (9) any apportionment or payment received from the state for experimental or special programs or pursuant to chapter six hundred thirty-five of the laws of nineteen hundred sixty-one; (10) any funds received from the federal government; provided, however, that there shall be excluded from such federal funds or other state apportionments any payments from such funds already deducted pursuant to this paragraph; (11) any payments made for which an apportionment is disallowed pursuant to regulations of the commissioner; and (12) any expenditures made for accounting, tabulation, or computer equipment, in excess of ten thousand dollars unless such expenditures shall have been specifically approved by the commissioner (13) any rentals received pursuant to the provisions of section four hundred three-a of this chapter; and (14) any rentals or other annual payments received pursuant to the provisions of section four hundred three-b of this chapter.

N.Y. Education Law § 3602 (McKinney 1981 Supp.)

TITLE V. TAXATION AND FINANCIAL ADMINISTRATION

ARTICLE 73—APPORTIONMENT OF PUBLIC MONEYS

PART I—GENERAL PROVISIONS

§ 3602. Apportionment of public moneys to school districts employing eight or more teachers

Notwithstanding any other provisions of this chapter or any other provisions of law, each school district of the state employing eight or more teachers shall receive its apportionment of public money payable during the school year commencing July first, nineteen hundred sixty-two and during subsequent school years pursuant to the provisions of this section and in lieu of any apportionments or payments otherwise payable under any other section of this chapter except any such apportionments or payments that may be payable to such district for school lunches, for services or programs provided by a board of cooperative educational services or by a county vocational education and extension board for such district, for the education of Indian children of a reservation under a contract with the state, by virtue of chapter six hundred thirty-five of the laws of nineteen hundred sixty-one, or for experimental or special programs in selected school districts.

1. Definitions. As used in this section the following terms shall be defined as follows:

[*See main volume for text of a to c*]

d. "Average daily attendance" shall mean the total number of attendance days of pupils in a public school of a school district plus the total number of instruction days for such pupils receiving home instruction including pupils receiving instruction through a two-way telephone communication system, divided by the number of days the district school was in

session as provided in this section. Such average daily attendance of a school district shall include the attendance, as computed in accordance with regulations of the commissioner as approved by the director of the budget, in programs of boards of cooperative educational services under contract with such district of pupils with handicapping conditions. For aid payable in the school year nineteen hundred eighty-one—nineteen hundred eighty-two and thereafter the attendance of pupils with handicapping conditions attending, under the provisions of article eighty-nine of this chapter, private schools, or boards of cooperative educational services shall be added to average daily attendance. For aid payable in the school year nineteen hundred eighty-one—nineteen hundred eighty-two and thereafter such average daily attendance of a school district shall include the attendance, as computed in accordance with regulations of the commissioner, of children attending pursuant to subdivision seven of section thirty-two hundred two of this chapter.

[*See main volume for text of e to h*]

i. "Pupil wealth ratio" shall mean the number computed to three decimals without rounding obtained when actual valuation of a school district for the year prior to the base year divided by the total wealth pupil units of such year is divided by the statewide average actual valuation per total wealth pupil unit as computed by the commissioner in accordance with the provisions of this section for such year. Such statewide average actual valuation per total pupil wealth unit shall be established each year by the commissioner before January first pursuant to regulations approved by the director of the budget and transmitted to the school districts. For aid payable in the school year commencing July first, nineteen hundred eighty-one such statewide average shall be seventy-two thousand seven hundred. For the school year commencing July first, nineteen hundred eighty-one the actual valuation of a school district used in the current year to compute such ratio shall not exceed the actual valuation of such district used to compute such ratio in the year prior to the base year by more than twenty per centum.

j. (1) "Operating aids base" for the purposes of this section for the school year commencing July first, nineteen hundred eighty-one shall mean the total amount a district was eligible to receive during the nineteen hundred eighty—eighty-one school year under the provisions of subdivisions twelve and thirteen or eighteen of this section or under any other law in lieu of such subdivisions plus aid received pursuant to subdivision one of section thirty of chapter fifty-three of the laws of nineteen hundred eighty. (2) For purposes of computing such base for the city school district of the city of New York such base may be computed on a borough basis only if formula aid under the provisions of subdivision twelve of this section is used for each borough. If after final audit it is determined that the city school district of the city of New York lost aid under the provisions of former paragraph c of subdivision eighteen of this section, such aid loss shall be subtracted from aid to those boroughs which, if such limit were computed on a borough basis, would have been subject to such limit. Such subtraction shall be made in accordance with regulations of the commissioner adopted for such purpose.

k. "Alternative pupil wealth ratio" shall mean the number computed to three decimals without rounding obtained when the adjusted gross income of a school district for the calendar year prior to the calendar year in which the base year began divided by the total wealth pupil units of such district is divided by the statewide adjusted gross income per total wealth pupil unit as computed by the commissioner pursuant to regulations adopted by him for such purpose. Such statewide average gross income per pupil shall be established each year by the commissioner pursuant to such regulations approved by the director of the budget and shall be transmitted to school districts. For aid payable in the school year nineteen hundred eighty-one—eighty-two such statewide average shall be twenty-nine thousand seven hundred dollars. For the purposes of this paragraph, the income data shall be computed in accordance with regulations adopted by the state tax commission based upon personal income tax returns for the calendar year two years prior to the calendar year in which the current school

year commences. For use in the school year commencing July first, nineteen hundred eighty-one each borough in the city school district of the city of New York shall be deemed to have the same percentage of tax returns validly reporting school district of residence as was atrributed to each borough in such city school district in the prior year.

2. Computation of weighted average daily attendance. For purposes of this section weighted average daily attendance of a school district for any school year shall be computed as follows:

[*See main volume for text of a to g*]

h. After the final computation of aid as provided in subdivision eighteen of this section, a school district which maintains an elementary school and which does not operate a kindergarten through twelve program and contracts for education or some or all of its secondary pupils in another school district which has a higher pupil wealth ratio used for the current year for the computation of operating aid may elect to receive the tuition adjustment provided under the terms of this subdivision. The total aid receivable under subdivision eighteen of this section by the sending district for the current year shall be divided by the total aidable pupil units of the sending district used for computation of aid for the current year and such amount multiplied by the number of secondary pupils for whom the contract is made. The resulting tuition adjustment will be paid to the sending district in addition to the aid computed under the provisions of subdivision eighteen of this section. The total aid receivable under subdivision eighteen of this section by the receiving district for the current year shall be divided by its total aidable pupil units used for computation of aid for the current year and such sum multiplied by the number of secondary pupils received by such district from the sending district during the current year and such sum shall be deducted from the amount the receiving district would be entitled to under the provisions of subdivision eighteen of this section. If the sending district elects to receive this adjustment, the tuition payable to the district furnishing instruction shall be computed in accordance with regulations adopted by the commissioner.

2-a. Computation of adjusted average daily attendance. For purposes of this section adjusted average daily attendance of a school district for any school year shall be computed as follows:

a. Adjusted average daily attendance shall be determined by using the average daily attendance of public school pupils in a full-day kindergarten and grades one through twelve as the basic unit, with the attendance of such pupils in one-half day kindergartens measured at one-half of such basic unit. The sum of all such units of attendance shall be the adjusted average daily attendance.

b. In computing such attendance, the school district shall (1) determine the number of religious holidays, not exceeding six, which fall on a school day in each of the eight or ten reporting periods which constitute a school year according to regulations established by the commissioner, such religious holidays to be duly recognized as such for purposes of this section by duly adopted resolution of the board of education and selected from the list of religious holidays prepared by the commissioner pursuant to law; (2) deduct the aggregate attendance on such religious holidays from the total aggregate attendance for each of such eight or ten attendance periods, by grade level; (3) deduct such religious holidays from the total number of school days in each such attendance period, by grade level; (4) compute the adjusted average daily attendance for the school year.

c. In any instance where a pupil is a resident of another state or an Indian pupil of a reservation or a pupil living on federally owned land or property, his attendance shall be counted as part of the adjusted average daily attendance of the school district in which he is enrolled.

2-b. Computation of total wealth pupils units.

a. For the school years commencing July first, nineteen hundred seventy-nine and thereafter total wealth pupil units will be computed using the adjusted average daily attendance for the year prior to the base year as computed in this section, plus the attendance of resident pupils attending public school elsewhere, less the attendance of nonresident pupils plus the

attendance of resident pupils attending full-time in board of cooperative educational services (not otherwise specifically included), plus, for aid payable in the school year nineteen hundred eighty-nineteen hundred eighty-one the attendance of pupils with handicapping conditions for whom the district has contracted under the provisions of section forty-four hundred two of this chapter, plus the additional aidable pupil units as computed pursuant to subdivisions nine and nine-a of this section, excluding summer and evening school pupils. The attendance of nonresident pupils attending public school in the district and resident pupils attending such schools outside of the district shall be determined by applying to the number of such pupils registered during the school year in each case the ratio of aggregate days attendance to the possible aggregate days attendance of all pupils in attendance in the district. Native American pupils of a reservation attending public school, or pupils living on the United States military reservation at West Point attending public school, shall be deemed to be resident pupils of the district providing such school, for purposes of this paragraph. Where a school district has entered into a contract with state university pursuant to paragraph *o* of subdivision two of section three hundred fifty-five of this chapter under which the school district makes payment in the nature of tuition for the education of certain children residing in the district, such children for whom such tuition payments are made shall be deemed to be resident pupils of such district for the purposes of this paragraph. A school district may elect the highest seven of eight or nine of ten attendance periods for the purpose of computing wealth units.

b. In determining the total wealth pupil units of a component school district of a central high school district for computing aid ratio the total wealth pupil units of high school pupils residing in such component district and attending the central high school shall be included. The total wealth pupil units of a central high school district itself shall be the sum of the total wealth pupil units of each component school district.

c. Notwithstanding the foregoing provisions of this subdivision, when a school district shall experience an increase in total

wealth pupil units during the current year because of the closing in whole, or in part, of a nonpublic school or a campus school, or a school previously operated by the United States government on the United States military reservation at West Point, the commissioner, in computing any aid ratio of such district, shall permit the use of such additional total wealth pupil units during the current year and the next succeeding year, provided that such additional total wealth pupil units attributable to such closing, or part thereof, shall be in excess of one hundred students; provided, however, that such district which qualifies for an increase in resident weighted average daily attendance pursuant to paragraph g of subdivision two of this section, shall use the increase in total wealth pupil units, even if such increase in total wealth pupil units is less than one hundred.

3. Computation of aid ratios. a. Building and board of cooperative educational services aid ratios. The aid ratio to be used in determining building aid apportionments to any school district pursuant to this section and for boards of cooperative educational services shall be computed in the following manner:

(1) The actual valuation of such district shall be divided by its resident weighted average daily attendance as computed pursuant to this section to determine its actual valuation per resident pupil.

(2) The commissioner before January first of each year shall determine the state average actual valuation per pupil in weighted average daily attendance for the preceding school year and shall transmit such figure to the school districts. For the school year commencing July first, nineteen hundred eighty-one such state average shall be eighty thousand eight hundred dollars.

(3) Such actual valuation per resident pupil of the school district shall be divided by such state average actual valuation per pupil and the result, carried to three decimal places without rounding multiplied by fifty-one per centum, and the result expressed as a percentage carried to one decimal place without rounding.

(4) The aid ratio of such district shall be the excess, if any, of one hundred per centum over the amount obtained in subparagraph three of this paragraph, but in no case more than ninety per centum.

b. Computation of first ceiling operating aid ratio. The first ceiling aid ratio shall be computed by subtracting from one the product obtained by multiplying fifty-one per centum by the pupil wealth ratio. This aid ratio shall be expressed as a decimal carried to three places without rounding, but shall not be less than zero.

c. Computation of second ceiling aid ratio. The second ceiling aid ratio shall be determined by subtracting from one the product obtained by multiplying eighty per centum by the alternate pupil wealth ratio. This aid ratio shall be expressed as a decimal carried to three places without rounding but shall not be less than zero.

[*See main volume for text of 4 to 6.b*]

c. For the school year commencing July first, nineteen hundred eighty-one any school district may compute aid under the provisions of this subdivision using the aid ratio computed for use in the current year or the aid ratio computed for use in the base year.

[*See main volume for text of 6-a*]

7. Apportionment for pupil transportation. a. In addition to the foregoing apportionment, there shall be apportioned to any school district for pupil transportation, ninety percentum of its approved transportation expense for the base year.

b. For the purposes of this apportionment, approved transportation expense shall be the actual expenditure incurred by a school district and approved by the commissioner (i) for those items for which an allowance would be provided under section three thousand six hundred twenty-seven for the transportation of pupils as defined in section three thousand six hundred twenty-one if the district were eligible for transportation quota state aid under part two of this article, and (ii) for the transportation required or authorized pursuant to article eighty-nine, and (iii) for regional or joint transportation sys-

tems operated by school districts or boards of cooperative educational services and (iv) for computerized bus routing services. Approved transportation expense shall include employers' social security contributions for transportation personnel. Approved district operated transportation expense shall also include all salaries related to transportation, except salaries for assistant drivers on buses transporting nonhandicapped pupils.

[*See main volume for text of c*]

[*d, e. Repealed.*]

8. Computation of total aidable pupil units for operating aid. A district's total aidable pupil units for the purpose of computing operating aid shall be the sum of the district's adjusted average daily attendance computed pursuant to this section plus the additional aidable pupil units computed for the base year under subdivision nine of this section. In such computation school districts may, with the commissioner's approval, exclude attendance for those days on which school attendance was adversely affected because of an epidemic or because of a religious holiday as provided in paragraph b of subdivision two of this section. For the purposes of computing operating aid a district may use either total aidable pupil units for the base year or the average of total aidable pupil units for the base year and the year prior to the base year, using the same pupil populations for the year prior to the base year as for the base year and using the base year definitions of total aidable pupil units in both years.

9. Additional aidable pupil units. a. The additional aidable pupil units used to compute total aidable pupil units pursuant to subdivision eight of this section shall be computed as follows: The attendance of pupils with special educational needs shall be multiplied by twenty-five per centum, the attendance of summer session pupils shall be multiplied by twelve per centum, and the attendance of evening school pupils shall be multiplied by fifty per centum. The sum of such products shall constitute the additional aidable pupil units. Nothing contained in this subdivision shall be construed to result in the

inclusion of the attendance of summer session or evening school pupils in the computation of weighted or adjusted average daily attendance pursuant to subdivision two of this section.

b. For the computation of total wealth pupil units the determination of the number of pupils with special educational needs shall use all wealth pupil units, excluding additional aidable pupil units. Only resident pupils shall be used for computation of wealth units. For aid payable in the school year nineteen hundred eighty-eighty-one additional total wealth pupil units for the handicapped shall be computed on the basis of the law in effect prior to July first, nineteen hundred eighty. For aid payable in the school years nineteen hundred eighty-one-eighty-two and thereafter such total wealth pupil units shall include weighted pupils with handicapping conditions with the attendance of private school pupils with handicapping conditions under section forty-four hundred two assigned an additional weighting of one hundred seventy percent.

9-a. Secondary school weighting. There shall be added to the total aidable pupil units computed in subdivision eight of this section a number obtained by multiplying by twenty-five per centum the adjusted average daily attendance in grades seven through twelve excluding attendance of pupils who receive a weighting for handicapping conditions except those for whom weighting is provided in clause (three) of subparagraph b of paragraph one of subdivision nineteen of this section and excluding the attendance of pupils for whom the district has received any additional apportionment attributable to subdivision seventeen of this section. Only resident secondary pupils shall be used for computation of wealth units.

[*See main vaolume for text of 10 and 11*]

12. Computation of operating expense aid. a. Apportionment to school districts for operating expense shall be the higher of (1) the sum of the apportionments computed pursuant to paragraphs b and c of this subdivision or (2) the apportionment computed pursuant to paragraph d of this subdivision.

b. Computation of aid under the first ceiling (sixteen hundred fifty dollars). The apportionment to any school district hereunder shall be determined by multiplying sixteen hundred fifty dollars by the first ceiling aid ratio with the product multiplied by the district's total aidable pupil units.

c. Computation of aid under the second ceiling. The apportionment to any school district hereunder shall be determined by multiplying two hundred thirty-five dollars by the second ceiling aid ratio with the product multiplied by the district's total aidable pupil units.

d. The apportionment to a school district may not be less than the amount computed by multiplying its total aidable pupil units by the sum of three hundred sixty dollars and the product of one-thousandth of the difference between one hundred one thousand dollars and the actual valuation of such district divided by its total wealth pupil units for the year prior to the base year; provided, that any negative remainder resulting from the subtraction of such actual valuation per total wealth pupil units from one hundred one thousand dollars shall be counted as zero.

13. Growth aid. a. The growth index of a school district to be used in determining its apportionment for growth aid shall be computed by dividing the average daily attendance of the district as computed in this section for the first four of eight or five of ten attendance reporting periods of the current year by such attendance for such periods of the base year and expressing the result as a percentage, carried to one decimal place without rounding; provided that if the commissioner determines that any of the first attendance periods in either the current year or the base year does not reasonably reflect the average daily attendance of the district because of energy shortages, epidemics, teacher strikes or other such emergencies an equal number of succeeding attendance periods not so affected by such occurrences shall be used in computing the district's growth index in each such year.

b. Any district having a growth index in excess of one hundred per centum shall be paid an additional amount in the current year determined by multiplying such excess by the

amount computed pursuant to subdivision twelve of this section.

14. Limitations on the apportionment. The apportionment to any school district during any school year shall be subject to the following provisions:

[*See main volume for text of a and b*]

c. Notwithstanding the provisions of this section, whenever two or more school districts are scheduled for reorganization pursuant to section three hundred fourteen of this chapter and whenever after July first, nineteen hundred sixty-five all such school districts so scheduled do reorganize, and (1) whenever such proposed reorganization includes at least two school districts, each of which maintains its own high school, or (2) where such proposed reorganization includes only one school district maintaining its own high school, whenever in such case such proposed reorganization, in addition to such school district maintaining its own high school, includes at least nine other school districts, or (3) whenever such proposed reorganization includes at least two central school districts, or (4) where such proposed reorganization includes at least one school district maintaining its own high school and, in addition thereto, includes at least one school district employing eight or more teachers, or (5) where such proposed reorganization includes a city school district, and in addition thereto, includes at least seven other school districts, beginning with July first, nineteen hundred sixty-five or the first school year of operation as a reorganized district after such date, such reorganized school district shall be entitled to an additional apportionment of twenty-five per centum of its apportionment as provided in subdivision six of this section whenever such apportionment is computed on the basis of its approved base year expenditures for capital outlay from its general capital or reserve fund and current years approved expenditures for debt services for school building purposes, the general contracts for which shall have been awarded on or after the date this act takes effect and prior to July first, nineteen hundred eighty-three or within ten years from the effective date of reorganization, whichever is

later as provided in subdivision six of this section, and which said sum shall be payable for and during the terms of any indebtedness created for the purpose of financing such construction or other facility as aforesaid, provided however, that in no event may the total apportionment under this paragraph and under subdivision six of this section for any project exceed ninety-five per cent of the sum of the base year approved expenditures for capital outlay for school building purposes from the general fund, capital fund or from a reserve fund, and current year approved expenditures for debt service for such purposes for such project. Notwithstanding any provisions of paragraphs c and d of this subdivision to the contrary, the commissioner is hereby authorized, in addition to any other state aid apportionments to which such district may be entitled under the provisions of this chapter, to make the additional reorganization incentive aid payments provided by such paragraphs c and d of this subdivision, in the amounts, and in the manner provided therein, to central school district number one of the towns of Brookhaven and Smithtown, Suffolk county, as if such newly reorganized district were included in the various categories of reorganization referred to in such paragraphs. In the event a school district is eligible for incentive building aid and again reorganizes pursuant to a new plan of reorganization established by the commissioner, and where such new reorganization shall again become eligible for incentive building aid, no project of such district shall be entitled to more than one such additional twenty-five percent apportionment.

[*See main volume for text of d and e; 15 to 16.g*]

h. Notwithstanding the foregoing provisions of this subdivision a school district may elect to receive in the school year commencing July first, nineteen hundred eighty-one the higher of either (i) the total high tax aid due and payable in the base year or (ii) the amount of aid due and payable in the current school year pursuant to the provisions of this subdivision.

i. For the school year commencing July first, nineteen hundred eighty, and thereafter, any school district which main-

tained a home school for grades kindergarten through eight, during the school year nineteen hundred seventy-nine—nineteen hundred eighty, which has indicated to the commissioner of education that it is willing to reorganize, although no district has been willing to join in reorganization with such district and which had a tax rate for high tax aid purposes during the school year nineteen hundred seventy-nine—nineteen hundred eighty under the provisions of this subdivision and which was above the ninetieth percentile for tax rates of all school districts in this state shall, notwithstanding the provisions of this subdivision, be entitled to receive an additional high tax aid computed by multiplying the district's total aidable pupil units for operating aid purposes by three hundred sixty-five dollars. Aid paid under this paragraph will not be part of the base used to compute high tax aid in any subsequent school year under the provisions of this subdivision.

17. Special services aid for large city school districts. a. The city school districts of those cities having populations in excess of one hundred twenty-five thousand shall be entitled to an apportionment under the provisions of this section.

b. There shall be apportioned to such city school districts for pupils in grades ten through twelve in attendance in occupational education programs as such programs are defined by the commissioner, subject for the purposes of this paragraph to the approval of the director of the budget, an amount for each such pupil to be computed by multiplying the occupational education aid ratio by the amount of the first ceiling for operating aid. Such aid will be payable for pupils attending occupational education programs operated by the school district and for pupils for whom such school district contracts with boards of cooperative educational services to attend occupational education programs operated by a board of cooperative educational services.

c. There shall be apportioned to such city school districts an amount computed by multiplying the expenses for data processing of each such district approved by the commissioner pursuant to regulations by the first ceiling aid ratio, but not less than thirty per centum.

d. Computation of occupational education aid ratio. Such ratio shall be determined by subtracting from one the product obtained by multiplying eighty per centum by the pupil wealth ratio. The aid ratio shall be expressed as a decimal carried to three places without rounding but shall not be less than zero.

18. a. Minimum apportionment. For the school year commencing July first, nineteen hundred eighty-one a district may elect to receive the higher of (1) the apportionment computed under subdivisions twelve and thirteen of this section for the current year or (2) the apportionment computed under the provisions of subdivisions twelve and thirteen of this section for the current year and the special aid which shall be computed for the year nineteen hundred eighty-one—eighty-two by multiplying the operating aids base by one hundred eight percent by the the total aidable pupil units for the base year (multiplied by the current year growth index, if greater than one) and dividing the product by the total aidable pupil units for the year prior to the base year (multiplied by the base year growth index, if greater than one) using the base year definition of total aidable pupil units for both years and subtracting from the result the aid payable under the provisions of subdivisions twelve and thirteen for the current year; in no event may the special aid so computed, when added to the aid payable under the provisions of subdivisions twelve and thirteen for the current year exceed the operating aids base.

b. Notwithstanding the provisions of this subdivision, any district which has an operating aids base greater than the amount computed under the provisions of paragraph a of this subdivision may elect to receive the operating aids base, in the current year.

c. Aid under this section shall be paid during the school year commencing July first, nineteen hundred eighty-one notwithstanding the provisions of paragraph b of subdivision fourteen of this section.

19. Excess cost aid for pupils with handicapping conditions. 1. Definitions. For the purpose of this subdivision the following terms will have these meanings:

a. "Pupils with handicapping conditions" shall mean pupils who are trainable mentally retarded, educable mentally retarded, visually impaired, hearing impaired, physically handicapped, speech impaired, emotionally disturbed, autistic, or learning disabled, as such terms are defined by the commissioner and who receive special educational services or attend programs which meet criteria established by the commissioner, operated by a district or by a board of cooperative educational services, whether or not the district is a component of such board.

b. "Weighted pupils with handicapping conditions" shall be the attendance of pupils during the base year in programs approved in accordance with the provisions of article eighty-nine of this chapter in public schools and boards of cooperative educational services and shall be computed as follows:

(1) The attendance of pupils who have been found by a committee on the handicapped either to require placement for sixty per centum or more of the school day in a special class, or to require home or hospital instruction for a period of more than sixty days, or to require special services or programs for more than sixty per centum of the school day shall be multiplied by one and seven tenths;

(2) The attendance of pupils who have been found by a committee on the handicapped to require placement for twenty per centum or more of the school week in a resource room or to require special services or programs for twenty per centum or more of the school week shall be multiplied by nine tenths;

(3) The attendance of pupils who have been found by a committee on the handicapped to require two or more periods a week of special instruction, either in speech or in another special program or services, shall be multiplied by thirteen hundredths.

(4) Such attendance of pupils with handicapping conditions, as such term is defined in section forty-four hundred five of this chapter, shall be computed in accordance with regulations of the commissioner. Such attendance for the school year nineteen hundred eighty—nineteen hundred eighty-one for a city school district in a city having a population of more than

one million, shall be computed by the commissioner using as a base attendance for the months of April, May and June nineteen hundred eighty, computed under the provisions of paragraph c of subdivision three of section forty-four hundred five of this chapter. No pupil may be counted more than once.

c. "Expense per pupil" shall mean approved operating expense for the base year divided by the sum of the total aidable pupil units plus weighted pupils with handicapping conditions, including pupils contracted for under section forty-four hundred two of this chapter assigned an additional weighting of one hundred seventy percent, plus, for the school year nineteen hundred eighty—nineteen hundred eighty-one the attendance of pupils with handicapping conditions attending special classes in boards of cooperative educational services and not specifically included in attendance otherwise. Expense per pupil shall be not less than the first tier operating aid ceiling and not more than the statewide average of such expense per pupil rounded up to the nearest fifty dollars as computed by the commissioner for such year by January first, of such year in accordance with regulations of the commissioner. For aid payable in the school year nineteen hundred eighty—nineteen hundred eighty-one such statewide average shall be twenty-one hundred dollars.

d. "Resident weighted pupils with handicapping conditions" shall mean weighted pupils with handicapping conditions minus the nonresident weighted pupils with handicapping conditions plus the resident weighted pupils with handicapping conditions to whom special services or programs are provided by another public school district.

2. Excess cost aid ratio. Such ratio shall be the first ceiling aid ratio used for operating aid, but not less than twenty-five percent.

3. Excess cost aid per pupil shall equal the product of the excess cost aid ratio and the expense per pupil.

4. Excess cost aid for the school year nineteen hundred eighty—nineteen hundred eighty-one shall equal the product of the excess cost aid per pupil and the weighted pupils with handicapping conditions; commencing July first, nineteen hun-

dred eighty-one and thereafter such aid shall equal the product of the excess cost aid per pupil and the resident weighted pupils with handicapping conditions.

5. A school district having a pupil with a handicapping condition for whom the cost, approved by the commissioner, of appropriate special services or programs exceeds the lesser of ten thousand dollars or four times the expense per pupil without limits shall be entitled to an additional apportionment for each such child computed by multiplying the district's excess cost aid ratio by the amount by which such cost exceeds three times the district's expense per pupil without limits.

6. For the school year commencing July first, nineteen hundred eighty-one any school district may receive the aid computed under former subdivision nineteen for the base year, or under any other provision in lieu thereof, in the base year, less any amount received under subdivision one of section thirty of chapter fifty-three of the laws of nineteen hundred eighty, or the amount computed under the provisions of this subdivision in the current year.

20. Low-income supplemental school aid. A school district shall receive an award based upon the following apportionment: a base grant of seven dollars, multiplied by the district's income ratio, multiplied by the district's total aidable pupil units as defined in this section.

a. For the purposes of this subdivision, the income ratio shall be computed by dividing New York State's adjusted gross income for the calendar year prior to the calendar year in which the base year began by the state's calendar year prior to the base year total wealth pupil units as defined in this section, used to compute the pupil wealth ratio for the current school year, the quotient of which shall be divided by the quotient of the district's adjusted gross income for such calendar year divided by the district's total wealth pupil units for the year prior to the base year as defined in this section carried to three decimal places without rounding. For aid payable in the school year nineteen hundred eighty-one—nineteen hundred eighty-two the New York state adjusted gross income per total wealth

pupil units, for the purpose of this subdivision, is twenty-nine thousand seven hundred dollars.

b. For the purposes of this subdivision, the income data for the income ratio shall be computed in accordance with regulations adopted by the state tax commission based upon personal income tax returns for the calendar year two years prior to the calendar year in which the current school year commences.

c. For the purposes of this subdivision, New York city will be eligible for aid only on a borough basis. For computing such aid in the school year commencing July first, nineteen hundred eighty-one each borough in the city school district of the city of New York shall be deemed to have the same percentage of tax returns validly reporting school district of residence as was attributed to each borough in such city school district in computing such aid in the prior year.

21. In addition to apportionments under subdivision eighteen of this section, each school district shall be entitled to an amount computed by multiplying by eight dollars the portion of the base year adjusted average daily attendance of such school district represented by pupils in grades kindergarten through six. Such aid will be provided to such districts for the purpose of performing diagnostic screening as described in section thirty-two hundred eight of this chapter.

22. Limited English Proficiency Aid. In addition to any other aid payable under the provisions of this section a school district shall be entitled to aid for conducting programs for pupils with limited English proficiency approved by the commissioner in accordance with regulations adopted by him for such purpose. Such aid per pupil shall be computed by multiplying five per centum by the result obtained when aid payable in the current year pursuant to subdivision eighteen of this section is divided by the total aidable pupil units used to compute such aid, or the total aidable pupil unit which would have been used to compute formula aid pursuant to subdivision twelve of this section if no total aidable pupil units were used to compute such aid. Such aid per pupil will be multiplied by the number of pupils participating in such program computed in accordance with such regulations. For the school year

commencing July first, nineteen hundred eighty-one aid shall be based upon pupil counts in the current year; thereafter such aid shall be based upon pupil counts in the base year.

23. Gifted and Talented Program Aid. In addition to any other aid computed under the provisions of this section, a school district which conducts a gifted and talented program in accordance with regulations of the commissioner adopted for such purpose shall be entitled to an amount computed by multiplying forty dollars ($40) by three per centum by the adjusted average daily attendance of such district.

As amended 1981, c. 53, §§ 7, 8, 10—36; L.1981, c. 663, § 1; L.1981, c. 885, § 2.

Nos. 82-639, 82-655

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1982

BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, *et al.*,

Appellants,

against

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION, *et al.*,

Appellees.

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, *et al.*,

Appellants,

against

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, *et al.*,

Appellees.

Appeals from the New York Court of Appeals

MOTION TO DISMISS OR AFFIRM

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Nos. 82-639, 82-655

IN THE

Supreme Court of the United States

October Term, 1982

BOARD OF EDUCATION, CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, *et al.*,

Appellants,

against

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION, *et al.*,

Appellees.

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, *et al.*,

Appellants,

against

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, *et al.*,

Appellees.

Appeals from the New York Court of Appeals

MOTION TO DISMISS OR AFFIRM

Appellees, the Commissioner of Education, the University, the Comptroller and the Commissioner of Taxation and Finance of the State of New York, move under Rule 16.1(a), (b), (c) and (d), of the Rules of this Court to dismiss two appeals from the same judgment of the New York Court of Appeals or, in the alternative, to affirm that judg-

ment. The Court of Appeals upheld "[t]he present amalgam of statutory prescriptions for State aid to local school districts . . ." as not violative of the Education Article of the New York State Constitution or of either the State or Federal Equal Protection Clauses. 57 N.Y. 2d 27, A1 *et seq.** Appellants in Appeal No. 639 are the Boards of Education of the Cities of New York, Buffalo, Rochester and Syracuse and certain students in those schools who have denominated themselves "city plaintiffs" (CJS 1**). In the trial court the city plaintiffs intervened in an action originally commenced by 27 school districts, which alleged that they were relatively poor in real property wealth, and by some students who attended school in those districts. Twenty-three† of those districts and twelve students by their parents and guardians are appellants in Appeal No. 82-655, and we will refer to them as "plaintiffs."

In the State courts, appellants attacked the system for financing education in New York. On this appeal, plaintiffs attack ". . . the manner in which New York State finances its public elementary and secondary schools" (PJS 1), while the city plaintiffs attack the Court of Appeals' judgment for ". . . finding no constitutional violation in the challenged statutory provision." "Provision" refers to all parts of New York Education Law (hereinafter, "Ed. L.") § 3602 reproduced in 53 pages of the Appendix at A331-A384.

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* Appendices in both appeals are identical except for the covers.

** References to the Jurisdictional Statement in Appeal No. 82-639 are preceded by "CJS" and to the Jurisdictional Statement in No. 82-655, by "PJS."

† Except for the Levittown Board of Education, the names of appellants in No. 655 do not appear in the papers filed on this appeal.

The grounds for this motion are that jurisdiction under 28 U.S.C. § 1257(2) is improperly invoked (Rule 16.1[a], Rules of the Supreme Court) because:

(1) the only real parties-in-interest in this action are school districts who do not have standing to claim denial of equal protection of the laws;

(2) a decision in favor of appellants would require non-judicial policy determinations and application of non-judicial standards;

(3) the power of local school districts with different levels of real property wealth to tax and spend local revenues for the support of public schools is derived from the State Constitution and statutes not attacked by plaintiffs on this appeal.

Further grounds for this motion are:

(4) appellants do not present a "substantial federal question" (Rule 16.1[b], Rules of the Supreme Court), since the classification attacked is traditional local governmental boundaries;

(5) for that reason, the judgment also rests on an adequate non-federal basis (Rule 16.1[b], Rules of the Supreme Court), since the powers and duty of local governments to participate in supporting public education in New York State is a matter of State law and has been upheld by the decision of the highest Court in the State.

(6) especially since this Court's landmark decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (hereinafter "*Rodriguez*")

disposes of these appeals, there is no substantial federal question (Rule 16.1[b], Rules of the Supreme Court) and "... the questions on which the decision of the cause depends are so insubstantial as not to need further argument." Rule 16.1(d), Rules of the Supreme Court.

In any event, these would be inappropriate appeals (Rule 16.1[d], Rules of the Supreme Court) in which to reconsider *Rodriguez* for the reasons already cited, and also because:

(7) New York State provides more spending per pupil even in the *poorest* district than all but two other States provide on the *average;*

(8) plaintiffs' claim that the State has a duty to eliminate among school districts differences in real property wealth per pupil is in conflict with the city plaintiffs' claim that real property wealth per pupil is an unfair measure of school district wealth; and

(9) since both sets of plaintiffs have steadfastly refused to propose a remedy which would meet their constitutional claims, the record does not support a contention that there are "less drastic means"* for effectuating the State's objective of supporting local public schools.

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* *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). Also see, *e.g.*, *Rodriguez, supra*, 411 U.S. at 17.

Statement of the Case

A. Financing Education in New York

The system which plaintiffs claim is unconstitutional is the one in the nation that has consistently provided the most money for public school students. Only Alaska spends more than New York's average, $3,467 per student. Appellees' Appendix* p. 2. Even a student in the poorest school district in New York, Salmon River, has more ($2,981) spent on him than the *average* student in any other State but Alaska and New Jersey. *Id.;* CAA 6771.** State aid accounted for $2,334 for each enrolled pupil in Salmon River. CAA 6771. The remarkable fiscal strength of New York's system is based on the combination of two voluntarily appropriated revenue sources: (a) general revenues from State income, sales and business taxes and (b) locally imposed taxes on real property. The State's appropriation for public, primary and secondary education is the largest item in the State budget and is distributed mostly to districts with relatively less real property wealth per pupil. The local contribution per pupil, highest in the United States, is determined by the vote of local residents.

B. Local Responsibility

Local school boards and their professional administrative staff determine the level of funding for education, as

* Attached as a two-page appendix to this motion are pages 34 and 36 of the National Education Association's Estimates of School Statistics, 1980-81, which were submitted to the New York Court of Appeals. Similar inter-state statistics are part of the record on appeal in the State courts.

** Numbers preceded by "CAA" refer to pages in the Appendix filed in the New York Court of Appeals.

well as the distribution of funds among schools, among students and among educational goals. They also control curriculum within wide parameters established by the State Legislature. The Court of Appeals held that there was no evidence "that the educational facilities or services provided in the school districts that they [appellants] represent fall below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents . . ." 57 N.Y. 2d 27 at 39, A12.

Except in the big five cities (city plaintiffs and Yonkers), school boards recommend the annual budget for the approval of the voters. They estimate State financial aid for the year, Federal aid and other receipts which may be from a number of sources including county appropriations. The differences between these receipts and the budget adopted by the voters is the local tax levy, which, in turn, establishes the rate of taxation on the district's real property.

In the case of the big five cities, appropriations are made as part of the annual budget process. Ed. L. §§ 2250 *et seq.* All revenues are received by the general city treasuries and, unless limited to special purposes, may be used by the cities for any governmental function. Local tax receipts, including those derived from taxes on local property, also are paid into the cities' general funds. Only Rochester, however, dedicates a fixed yield of the real property levy to the support of public schools. Increases in State education aid after 1976 must be spent for school purposes. L. 1976 ch. 132 § 1; Ed. L. § 2576(9); *Matter of Board of Education* v. *City of New York,* 41 N.Y. 2d 535 (1977).

C. State Aid

State aid to local school districts also is appropriated annually. The statutory formulae often are adjusted as part of the annual budget bill (ch. 53) to address problems raised by districts and their representatives and to effect basic policy changes.

1. The Aid Ratios

Operating aid is distributed in inverse relationship to taxable wealth in a two-tier formula based on aid ratios. The first tier guarantees that the State will share up to a ceiling of $1,650 per pupil of the district's operating expense for schools. A district of average wealth will receive 49% of the approved costs up to the ceiling. Districts above the State average per-pupil wealth will be reimbursed for a smaller percentage of their expense, and districts below the average, for a larger percentage. The district of average wealth last year had a full valuation per pupil of $72,700. An aid ratio means that the tax rate* necessary to raise the local share of the ceiling is the same for each district. It is determined by what the average district needs to raise $841.50 per pupil (51% of $1,650) which last year was $11.57 for $1,000 full value (11.57 "mills"). The median tax rate was 21.53 mills. If the average value of real property continues to rise, the tax rate necessary to raise the local share will decrease. The second tier operates the same way except that it is

* Full or actual value of real property ("full value") is defined by Constitution (Art. VIII, § 10) and statute (Ed. L. § 3602[1][c]) which require that the State equalization rate be applied to a district's assessment rolls. It is conceded to be an accurate comparative measure for districts with different assessment practices. In this motion, when we refer to tax rates, we refer to the tax on assessed value multiplied by the equalization rate—"full value tax rate."

related to income and guarantees an equalized amount of $235. Ed. L. § 3602(12)(e); L. 1981 ch. 53 § 25. The district of average wealth per pupil ($29,700 in 1981-1982) receives 20% of $235. Every district can raise more than $1,885 by imposing a higher tax rate.

High tax aid is paid to districts with property wealth lower than the State average and local tax rates of at least 20 mills. Twenty-four of the thirty original plaintiff districts receive aid under this provision. Ed. L. § 3602(16); L. 1981 ch. 53 § 28. Lower income supplemental aid of $27.7 million is also provided. Ed. L. § 3602(20); L. 1981 ch. 53 § 33, IFF 2-A(c), A6492.

2. *Weighted Pupil Units*

District wealth is measured per pupil and State aid is distributed per pupil; but those "pupils" are not individuals. They are pupil constructs—TWPU (total wealth pupil units) for the wealth measure and TAPU (total aidable pupil units) for aid distribution. There are more constructs than enrolled pupils. These constructs reflect the number of pupils attending school in average daily attendance (ADA), Ed. L. § 3602(2-b), and several weightings.

An additional 0.25 weighting is given to a district for each of its secondary school pupils in grades seven through twelve. This amounts to $471.25 or a total of $2,356.25 guaranteed for each such student.

All districts receive an additional 0.25 weighting to their pupil count for each student with special educational

needs ("PSEN"). The proportion of such pupils in a district is identified by use of math and reading achievement tests given in the third and sixth grades (Pupil Evaluation and Placement or "PEP" tests). The proportion of students in the bottom three stanines (centiles) on this combined test in 1974 and 1975 is applied to the entire school district population each year to determine the number of pupils aidable as educationally disadvantaged in that district. L. 1974 ch. 241; Ed. L. § 3602(1); A4821-A4826, A4838. According to this formula each district is guaranteed an extra $471.25 or a total of $2,356.25 for each PSEN student in the sixth grade or lower. PSEN pupils in secondary grades are guaranteed an additional weighting of 0.5 or $942.50 each, a total of $2,827.50 for such a pupil. This mode of assistance reimburses for concentrations of disadvantaged students.

3. Aid to the Handicapped

Substantial additional weightings are also added for handicapped students on the basis of services needed. If they need special class placement for 60% of the day or out-of-school instruction for at least sixty days a year, they receive an additional 1.7 weighting each. An extra 0.9 weighting is accorded to students needing special services 20% or more of their time. If such students need as little as two periods a week of special instruction, they are weighted an additional 0.13. Determinations of the services needed are made by the local Committee on the Handicapped. Ed. L. § 3602(19); L. 1981 ch. 53 § 32; L. 1980 ch. 13. Also see 8 NYCRR 200.4(e)(3)-(4).

Districts are reimbursed for their actual expenses over the operating aid ceiling of $1,885 within a minimum and

maximum which were established by a cost survey (Excess Cost Aid) which is adjusted each year. Ed. L. § 3602(1)(d), (2)(b), (9)(b). For the 1.7 weighted student, the district received an additional amount of from $2,805 to $3,910 last year. If it spent at least $5,795 on such a child, the district was guaranteed that much for his or her education. For the 0.9 weighted student, the district received an additional amount of from $1,485 to $2,070. If it spent at least $3,955 on such a child, the district was guaranteed that much for his or her education. For the 0.13 weighted student, the district received an additional amount of from $214.50 to $299. If it spent at least $2,184 on such a child, the district was guaranteed that much for his or her education.

For handicapped children in exceptionally expensive programs (ones that cost at least $10,000 or four times the expense of a handicapped child in that district) additional aid ratio assistance is paid. The State also aids the diagnosis of educational needs for each student in the primary grades. Ed. L. § 3602(21); L. 1981 ch. 53 § 34.

As tuition for their blind or deaf children being educated at State-run schools, districts are required to pay an amount equal to the locally raised share of their per-pupil operating aid for an unweighted student. Ed. L. §§ 4204b, 4357. Tuition at privately run schools, for students for whom the school district or BOCES cannot provide the necessary education, is paid on an aid-ratio basis. Ed. L. Art. 89 §§ 4405-4407; Family Court Act §§ 232-236.

4. BOCES Schools and Special Services Aid

Most school districts in the State use the services of regional schools run by State Boards of Cooperative Educational Services (BOCES). They provide specialized education such as occupational education or education for persons with various handicaps. The residential district pays tuition based on actual costs. The district receives aid as if the students were educated within the home district, except in the case of occupational education. For such students districts receive additional aid according to either of two formulae. The first is an aid ratio in inverse relationship to real property wealth. The second is a tax effort formula in which districts are assisted by reference to their full value tax. Thus, all districts with the same tax rate receive the same aid, if they choose the second alternative. To the extent that BOCES tuition is greater than the costs allowed, as is frequently the case, this difference is paid entirely out of local funds. Ed. L. § 1950. Regional organization is largely irrelevant to the large cities. They receive extra assistance for vocational education pursuant to an aid ratio based on an extra amount of $1,650 per pupil. Ed. L. § 3602(17)(b).

5. Minimum Guarantees

Under the aid ratio, districts with a full value of more than $142,549 per pupil and per pupil income wealth of more than $37,125 would receive no aid, but the statute guarantees that no district will receive less than $360 per pupil—the "flat grant". Ed. L. §§ 3602(3), (12), A6437. In 1981-1982, the total dollar amounts attributable to flat grant aid dropped to $92.5 million—only 3.1% of the total

operating aid distributed—and, excluding the flat grant aid going to New York City of $51.2 million—only 1.4% of the State total for operating aid.

There are two options under the Education Finance Law available to a district experiencing rapidly rising real property values or decreasing population to allow it to receive the aid it received the previous year. L. 1980 chs. 53 § 18, 678 §§ 1-2; Ed. L. § 3602(18). Under the first—"special aid"—each district is entitled to receive an increase of 8% per pupil as long as it does not exceed the total it received the prior year. Under the second—district-wide, or "total dollar save harmless"—each district is guaranteed the same total aid it received in the previous year. In the 1981-1982 school year, the additional amount of State aid paid through save-harmless and special aid was $90.36 million, only 3% of operating aids.

6. Aid for Non-Operating Expenses

The State also assists districts to meet non-operating expenses. Aid for approved capital expenditures is distributed in inverse proportion to a district's wealth in real property. Ed. L. § 3602(6). Districts are reimbursed for up to $15 per resident pupil for textbooks. Ed. L. § 701; L. 1978 ch. 74. The State pays 90% of the costs of transporting students one-and-one-half miles or more to school. L. 1981 ch. 53 § 19. Provision has been made to assist school districts with the removal of unsafe asbestos with 40% of the aid going to New York City. L. 1981 ch. 53 § 1.

7. Categorical Aids

The Legislature grants assistance for the gifted and talented (Ed. L. § 3602[23]; L. 1981 ch. 53 § 36) and $4.06 million for students with limited English proficiency. Ed. L. § 3602(2). L. 1981 ch. 53 § 35.

Several categorical aids are directed solely to the big five cities: Electronic data processing assistance (Ed. L. § 3602[17][d]); Reading and Academic Program aid of $20.25 million (L. 1981 ch. 53 §§ 38-42); and $10 million for Incentives for Improving Pupil Performance (Ed. L. § 3602[19]).

D. The Plaintiffs' Contentions

Existing State aid statutes address virtually all of the problems raised by the plaintiffs, but according to them, State aid does not go far enough. With two exceptions, flat grant and save-harmless, State aid ameliorates the inequities of which they complain in that it is provided to districts in inverse relationship to their taxable wealth. Plaintiffs complain that the aid does not completely compensate for the freedom of districts to raise local funds for education when their taxable resources are not equal. Thus, since under the New York Constitution (Article VIII §§ 1, 2, 3, 4[h], 8, 10, 12) districts with great real property wealth are free to impose substantial tax rates to benefit local schools and even districts with low wealth are free to impose low tax rates, there can be and are differences in expenditure on education. It is the freedom of local governments that plaintiffs would compromise.

The city plaintiffs also do not attack the contents of the State aid statutes except in certain limited respects

such as counting children on the basis of attendance, rather than enrollment. Extra aid per pupil is given for disadvantaged, handicapped, bilingual and vocational students, and categorical aids which benefit urban youngsters are provided. The city plaintiffs' main thrust is against what is not in the statutes, rather than what is provided. They contend that their non-educational expenditures must be considered in evaluating their real property wealth, that they must be compensated because they pay more for education, and that per-pupil aids for handicapped and disadvantaged students are not sufficient to compensate the cities for their concentrations of those students.

Appellants' attacks would actually threaten the level of resources available to educate children by depreciating the use of a productive revenue source, by diverting educational aid to compensate for non-educational expenditures and by interfering in a legislative process that has produced excellent levels of spending on pupils: (a) Although almost $6 billion for public education is presently raised by voluntarily-imposed local real property tax, the plaintiffs' argument threatens the freedom of local school districts to tax themselves because the real property wealth in the several school districts is not the same. (b) The city plaintiffs argue that the Fourteenth Amendment requires States to use educational aid to reimburse cities for the non-educational expenditures in "municipal overburden" aid and as compensation for cost-of-living differentials. (c) Both arguments would upset the delicate legislative balancing which has produced the highest levels of expenditures on public education in the country. Moreover, they would do so without demonstrating that there is an alternative system that would meet all their claims based on

feasible revenue sources and that would actually benefit a significant number of children substantially enough to justify the harm it would do to others.

E. The Decision of the New York Court of Appeals

The State Court of Appeals recognized New York's consistent commitment to education as its highest priority for public expenditures; but it also recognized that local control of education in the State had resulted in disparities in levels of expenditures. It, nonetheless, held that there was no violation of the Federal or State (Article I § 11) Equal Protection Clauses or of the State Education Article (Art. XI).

As had been consistently acknowledged throughout this action, the Court found that the plaintiffs' claims under the Fourteenth Amendment were precluded by this Court's decision in *Rodriguez*. 57 N.Y. 2d at 41, A15. The Court of Appeals held that the same analysis defeated the city plaintiffs' claims since the inequalities to which they referred were ". . . the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction. . . ." *Id.*

> "The disbursement of the funds received from real estate taxes and such other sources and the decisions as to how they shall be allocated are decisions to be made by municipal governmental bodies. In the words of Justice HOPKINS [in his dissent to the opinion of the Appellate Division of the Second Department in this case]: 'It is beyond the power of this court in this litigation to determine whether the appropriations of the intervenor-plaintiffs have been wisely directed or rea-

> sonably applied, or whether their budgets are fairly divided in terms of priority of need between the competing services, such as police, fire, health, housing and transportation, and it is, equally, beyond the power of the court to determine whether the resources of the intervenor-plaintiffs can otherwise be employed so that their educational needs can be met.' (83 AD2d 217, 262) . . ." 57 N.Y. 2d at 42, A16.

On the same grounds the city plaintiffs' Equal Protection claims under the State Constitution were also rejected. 57 N.Y. 2d at 47, A21.

The fact that legislation deals with education does not make it suspect or presumptively unconstitutional, even under the State's Equal Protection Clause, the Court reasoned. The State Constitution which requires public education is unlike the Federal Constitution, since it includes many declarations of power and authority which have no claim to special consideration under the Equal Protection Clause. 57 N.Y. 2d at 43 n.5, A17. Of great importance to the State Court, as to this Court in *Rodriguez*, was the fact that no classification based on personal characteristics was involved.

Relying on this Court's decision in *Rodriguez* as persuasive authority for its interpretation of the parallel State provision, the Court held ". . . the preservation and promotion of local control of education—is both a legitimate State interest and one to which the present financing system is reasonably related." 57 N.Y. 2d at 44, A18.

Plaintiffs' disputes with two particulars of State aid—flat grant and save-harmless (see pp. 11-12, *ante*)—were

rejected partly because they affect only a minimal amount of aid. The Court also noted that the flat grant was not unequal and that save-harmless provisions protect districts from the effect of changing property values or diminished pupil registration. 57 N.Y. 2d at 46-47, A20-A21.

Contrary to the city plaintiffs' assertion that they proved a denial of educational opportunity, the Court of Appeals held:

> " 'No claim is advanced in this case, that the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents; their attack is directed at the existing disparities in financial resources which lead to educational unevenness above that minimum standard.' "

Holding that the Legislature had provided a sound basic education for the children of the State, the Court of Appeals found the mandates of Article XI § 1 had been met. It rejected the city plaintiffs' contention that their students were denied a minimum education. 57 N.Y. 2d 38, 48, A12, A22. The constitutional prescription (Article XI § 1) of a "system of free common schools" does not mandate equality of expenditures. The language and the legislative history were found to foster the pluralistic system which has always existed in New York. 57 N.Y. 2d at 47-49, A21-A23.

Like this Court in *Rodriguez*, the Court below carefully confined itself to an appropriate judicial role. It consciously refused to intrude into the arena of substantive policy determinations which are the responsibility of the politically elected branches of government. 57 N.Y. 2d at 39-40, 43, 50 n.9, A12-A13, A16, A23.

ARGUMENT

These Appeals Are Disposed of by This Court's Decision in *Rodriguez* and Do Not Present an Appropriate Context to Overrule Its Cogent Reasoning.

A. *Rodriguez* Upheld Local Differences in Financing Schools, and Plaintiffs Present No Substantial Federal Question for Review.

In its landmark decision upholding the Texas system of educational finance, this Court recognized the general application of its analysis to other state educational finance systems. 411 U.S. at 17-19, 23, 26 n.62, 28-29, 37, 42-44, 47-49, 55-59. In *Rodriguez,* the plaintiffs attacked Texas law, claiming that it discriminated against poor, minority students in low wealth districts; but this Court held the system to be reasonably related to the state goals of providing a minimum education while promoting local control. 411 U.S. at 5, 12-13, 39, 40-55. It rejected the contention that distinctions based on school district wealth were suspect classifications. 411 U.S. at 18-25, 53-55. Indeed, differences between local governmental units are presumptively valid. 411 U.S. at 27-28, 50-53.

This Court also denied that education was a fundamental right under the Equal Protection Clause. 411 U.S. at 29-37. This was especially so since the right asserted did not involve freedom from governmental intrusion.* 411 U.S. at 38-39. It also noted that only a relative, not absolute, deprivation of education was alleged. 411 U.S. at 29-25,

* New York's guarantee of a system of free common schools concededly mandates governmental intrusion. In this situation, suspicious scrutiny of State legislation is illogical.

37. Compare *Plyler* v. *Doe*, —— U.S. ——, 50 U.S.L.W. 4650, 4651, 4655-4657 (1982). The Court warned that State statutes would not be invalidated because all desirable provisions were not included and all evils were not struck down. 411 U.S. at 39. The application of that familiar precept alone disposes of these appeals.

In rendering its thoughtful decision, this Court carefully kept within the bounds of the Federal judicial power, refusing to enter the political arena to change state policies with which it might disagree. 411 U.S. at 31, 33, 40-44, 56-59. Also see Stewart, J., concurring. 411 U.S. at 59-61.

The city plaintiffs' assertion that their claims are stronger than those of the plaintiffs in *Rodriguez* is puffery, not reason. In the first place, all the plaintiffs in *Rodriguez* were poor, minority students residing in property-poor districts. 411 U.S. at 5, 19. The city plaintiffs' case is weakened by the fact that they are school districts, not individuals with Fourteenth Amendment rights; by the fact that the districts are not poor in taxable wealth; by the fact that the students, named as plaintiffs, about whom not one word of evidence was adduced, do not even allege that they are uneducated or poor; and by the fact that the Texas system did not distribute most aid in inverse relation to real property wealth, although local revenues were obtained solely from that source. 411 U.S. at 10, 13-14.

New York City in 1981-82, had more real property wealth per-pupil ($75,926 [Appendix in New York Court of Appeals A6804]) than the average district in the State. It also received 75% of its revenues from sources other than property taxes. N.Y.C. Mayor's 1982 Budget Message at

p. 2. Yet it claims that it does not have sufficient resources to educate its students. This does not compare* favorably with the plaintiffs in *Rodriguez* who were pupils in the Edgewood School District of San Antonio, Texas, which had $5,960 in real property per pupil and 96% minority students in its city school district. 411 U.S. at 12. The State of Texas contributed $222 per pupil [*Id.*] while New York pays more than $1300 to New York City (Appendix in Court of Appeals A6806). However, the former level of funding was such that last term this Court found that there was "no dire shortage of educational resources" in Texas (*Plyler, supra,* 50 U.S.L.W. at 4657 n.25) in a suit brought by Hispanic children to attend school in districts like Edgewood. The decision of the New York Court of Appeals that a minimum education was provided to all New York pupils (57 N.Y. 2d at 38, 48, A12, A22) does not go beyond this Court's holding in *Rodriguez* and *Plyler*.

That the city plaintiffs proposed some ideas for formulae which would increase their State aid does not distinguish this Court's decision in *Rodriguez* which, quoting *Katzenbach* v. *Morgan,* 384 U.S. 641, 657, held:

> " 'a "statute is not invalid under the Constitution because it might have gone farther than it did," [*Rosen* v. *Ward,* 279 U.S. 337, 339] that a legislature need not "strike at all evils at the same time," [*Semler* v. *Dental Examiners,* 294 U.S. 608, 610] and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind [*Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489]" ' ". 411 U.S. at 39.

* While this comparison spans a decade, time alone cannot account for the differential. In 1980-81, the average expenditure per pupil in Texas, 45th in the nation, was still about half of New York's. Appellee's Appendix, p. 2.

B. *Rodriguez* Should Not Be Overruled.

This Court's decision in *Plyler* v. *Doe, supra,* does not undermine the wisdom of *Rodriguez,* which it cites as authority and which has repeatedly been relied on by this Court and all courts of this country since it was rendered. The difficulty in *Plyler* arose because undocumented alien children are innocent of the knowing commission of the crime of illegal immigation, which set them apart from others under Texas law. 50 U.S.L.W. at 4655-4656. While education is not a fundamental right (50 U.S.L.W. at 4656), it is important and the absolute deprivation of an education may stigmatize the child for life. 50 U.S.L.W. at 4655-4657.

This Court held that illegal aliens were "persons" entitled to the protection of the Fourteenth Amendment (50 U.S.L.W. at 4652-4654) and applied traditional Equal Protection analysis, citing *Rodriguez* as authority. 50 U.S. L.W. at 4655-4656. It measured this quasi-suspect classification in the context of absolute deprivation of an education and found the statute irrational. 50 U.S.L.W. at 4654, 4656. This same analysis had already demonstrated that the method of financing those Texas schools to which the *Plyler* children so desperately sought access was not invalid. *Rodriguez, supra.*

The separate concurrence of Justice Powell demonstrated that the holding in *Plyler* is consistent with *Rodriguez* because the classification in *Plyler* was based on a personal characteristic not controlled by innocent children

and was therefore subject to heghtened scrutiny. 50 U.S. L.W. at 4660. The separate concurrence of Justice Blackmun reiterates his support for the holding in *Rodriguez,* but would treat education as a relatively more fundamental right (50 U.S.L.W. at 4658-4659), although he recognized the problem of expanding the concept of fundamental right in Equal Protection cases. 50 U.S.L.W. at 4658. For purposes of this motion, Justice Blackmun's reiteration of the holding in *Rodriguez* would support dismissal of this appeal.

The dissent also relies on the *Rodriguez* analysis. Only Justice Marshall, in concurring, continues to assert that educational statutes must be subjected to strict scrutiny. 50 U.S.L.W. at 4657-4658.

The holding in *Rodriguez,* relying as it does on fundamental principles of separation of power, on federalism and on the employment of neutral judicial standards, is a powerful statement of this Court's consistent position. It echoes the eloquence of former Chief Justice Warren as to the inherent reasonableness of differences based on local governmental boundaries, *McGowan* v. *Maryland,* 366 U.S. 420 (1961), and the proper role of this Court, *Baker* v. *Carr,* 369 U.S. 186, 217 (1962). Indeed the Court which he headed twice summarily affirmed decisions upholding state educational finance systems against attack under the Fourteenth Amendment. *Burruss* v. *Wilkerson,* 397 U.S. 44 (1970); *McInnis* v. *Oglivie,* 394 U.S. 322 (1969).

C. Even If This Court Were to Reconsider Its Holding in *Rodriguez*, This Would Be an Inappropriate Appeal in Which to Do So.

Even if *Rodriguez* were not a decision of such broad application, the core of its holding on State educational finance systems must be sustained for the reasons already cited. Therefore if this Court were to employ an intermediate measure of validity under the Equal Protection Clause, that should be applicable only to quasi-suspect classes like those based on gender, as in *Reed* v. *Reed*, 404 U.S. 71 (1971), or undocumented alien children, as in *Plyler, supra*, or illegitimacy, as in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

1. Appellant School Districts Do Not Have Standing to Assert the Constitutional Rights of Children.

The only real parties in interest in this proceeding have been school districts. As political subdivisions of the State they have neither equal protection rights, *McGowan* v. *Maryland*, 366 U.S. 420, 427 (1961), nor standing to challenge the constitutionality of State legislation in federal court, *Williams* v. *Mayor*, 289 U.S. 36, 40, 47-48 (1933). While children are named as tokens (compare *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252, 263-264 [1977]), not one iota of evidence about any of them was introduced. There are inherent conflicts between children and their districts at least on intra-district distribution of funds. Therefore, plaintiffs' lack of standing in this case is even clearer than was the case in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Also see *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975).

An example of such a conflict is the cities' municipal overburden theory, which is based on the proposition that education is the cities' lowest priority. *All* other municipal expenditures are claimed to be inexorable, and they say that only residual amounts are available for education. Although the cities do not even allege that they direct proportionally more of their resources to their poor, disadvantaged, Black or Hispanic students, they demand State aid just for having to cope with them. Yet, New York City, with 30% of the State's school children, failed to take full advantage of State aid to the handicapped. In general, all New York school districts order the priorities and appropriate resources among children and programs (see 57 N.Y. 2d at 41-42, A15-A16) and thus have an interest in this action which is different from the students. School districts seek to shift resources to themselves, but the apportionment of finances among local governments is not governed by the Fourteenth Amendment. See *Lindsay* v. *Wyman*, 372 F.Supp. 1360 (S.D.N.Y. 1974), *aff'd sub nom. Beame* v. *Lavine*, 419 U.S. 806 (1974).

2. *Since Appellants Have Never Identified the Remedy They Seek, Or the Statutes They Attack, This Would Be an Inappropriate Case to Invalidate Comprehensive Legislation Which Provides Excellent Schooling for Millions of Children.*

Plaintiffs have consistently refused defendants' demand to identify a fiscally feasible system which would meet constitutional mandates and would benefit the students in the districts they represent. Aside from the suggestion of non-justiciability, which the absence of a remedy implies, it also renders a claim for heightened scrutiny under the Equal Protection Clause impractical. Plaintiffs cannot

assert that there is a "less drastic means" (*e.g. Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972); *Rodriguez, supra*, 411 U.S. at 17), when they refuse to identify one.

Appellants do not even identify the statutory pronouncements which they wish to have declared unconstitutional. They merely append more than 50 pages of the State aid law (A331 *et seq.*) without identifying particular defts. Furthermore, this statute does not empower the local districts to tax and support education. Compare N.Y. Const. Art. VIII §§ 1, 2, 3, 4(h), 8, 10, 12; N.Y. Ed. L. Article 31 (§§ 1501-2701). This is an inappropriate posture from which to demand the solemn act of invalidation of legislation entitled to the presumption of validity.

3. The Conflicting Rulings Which the Two Sets of Appellants Seek Demonstrate the Reasonableness of New York's Educational Finance System.

While plaintiffs assert that New York's educational finance system permits too great disparities in real property wealth per pupil among school districts, the city plaintiffs criticize the system for the opposite—weighing State aid too heavily for property poor districts when the cities have other serious problems. These two conflicting claims inadvertently demonstrate that the system actually is fair. It compensates for lack of real property wealth without eliminating the local control or fiscal participation of school districts. It does give additional weighting to disadvantaged and handicapped children, as well as other urban aids. However, it is a pluralistic system, *Rodriguez*, 411 U.S. at 50, which delivers aid so that ". . . all the children of this State may be educated." (N.Y. Const. Article XI § 1).

Although New York is proud of its leadership in education, it is not the defendants' position that the present system is perfect. The legitimate interests that it addresses are so varied, changing, interrelated with other legitimate interests, and subject to competing demands in the face of finite resources, that the concepts of perfection, or "less drastic means" (*Rodriguez*, 411 U.S. at 42) are not relevant. But institutional democratic methods for improvements are continuously utilized. In this as in other states the social "laboratories" for educational finance are at work. *Rodriguez*, 411 U.S. at 50. The State Legislature has the awesome and exclusive responsibility for addressing such needs. The Legislature's actions, even if controversial, deserve this Court's respect so long as there is no invidious discrimination.

Conclusion

Upon the Foregoing, This Appeal Should Be Dismissed, or the Judgment Below Affirmed.

Dated: New York, New York
December 16, 1982

Respectfully submitted,

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TABLE 9.--ESTIMATED REVENUE AND NONREVENUE RECEIPTS, 1980-81**

REGION AND STATE	REVENUE RECEIPTS BY SOURCE (IN THOUSANDS) FEDERAL	STATE	LOCAL AND OTHER	TOTAL	PERCENT OF REVENUE RECEIPTS BY SOURCE FEDERAL	STATE	LOCAL AND OTHER	NONREVENUE RECEIPTS (IN THOUSANDS)	TOTAL RECEIPTS (COLS. 5 AND 9) (IN THOUSANDS)
1	2	3	4	5	6	7	8	9	10
50 STATES AND D.C.	$9,158,148	$50,798,376	$42,311,193	$102,267,717	9.0	49.7	41.4	$4,388,914	$106,656,631
NEW ENGLAND	413,886	2,263,616	3,591,504	6,269,006	6.6	36.1	57.3	57,728	6,326,734
CONNECTICUT	87,801	525,251	912,448	1,525,500	5.8	34.4	59.8	16,000	1,541,500
MAINE	43,200	233,000	200,800	477,000	9.1	48.8	42.1	15,000	492,000
MASSACHUSETTS	228,411	1,262,740	1,774,041	3,265,192	7.0	38.7	54.3	0	3,265,192
NEW HAMPSHIRE	17,073	25,000	331,509	373,582	4.6	6.7	88.7	20,578	394,152
RHODE ISLAND	24,000	158,600	226,700	409,300	5.9	38.7	55.4	800	410,100
VERMONT	13,401	59,025	146,006	218,432	6.1	27.0	66.8	5,350	223,782
MIDEAST	1,331,987	9,170,671	11,434,894	21,937,552	6.1	41.8	52.1	528,229	22,465,781
DELAWARE	40,000	210,700	68,400	319,600	12.6	66.0	21.5	5,000	323,600
MARYLAND	160,987	[illegible]	1,120,094	2,124,832	7.6	39.7	52.7	15,529	2,140,361
NEW JERSEY	150,100	1,630,800	2,354,800	4,135,700	3.6	39.4	56.9	27,500	4,163,200
NEW YORK	465,000	3,955,000	5,000,000	9,420,000	4.9	42.0	53.1	300,000	9,720,000
PENNSYLVANIA	478,100	2,530,900	2,615,300	5,624,300	8.5	45.0	46.5	180,200	5,804,500
DIST. OF COLUMBIA	37,800	...	276,300	314,100	12.0	...	88.0	...	314,100
SOUTHEAST	2,437,226	11,026,802	5,906,754	19,370,782	12.6	56.9	30.5	707,877	20,078,659
ALABAMA	145,000	844,577	215,000	1,204,577	12.0	70.1	17.8	37,000	1,241,577
ARKANSAS	114,387	424,794	246,806	785,987	14.6	54.0	31.4	23,597	809,584
FLORIDA	300,000	2,000,000	1,150,000	3,450,000	8.7	58.0	33.3	130,000	3,580,000
GEORGIA	265,686	1,138,437	654,777	2,058,900	12.9	55.3	31.8	47,006	2,105,906
KENTUCKY	155,000	935,000	237,000	1,327,000	11.7	70.5	17.9	60,000	1,387,000
LOUISIANA	230,000	851,000	460,000	1,541,000	14.9	55.2	29.9	63,000	1,604,000
MISSISSIPPI	206,858	495,825	195,886	858,569	24.1	57.1	22.8	25,423	883,992
NORTH CAROLINA	299,768	1,464,773	475,000	2,239,541	13.4	65.4	21.2	37,000	2,276,541
SOUTH CAROLINA	173,900	710,700	325,000	1,209,600	14.4	58.8	26.9	35,000	1,244,600
TENNESSEE	233,038	748,835	567,045	1,548,918	15.0	48.3	36.6	118,560	1,667,478
VIRGINIA	221,840	954,078	1,155,451	2,331,369	9.5	40.9	49.5	91,254	2,422,623
WEST VIRGINIA	91,749	498,783	224,789	815,321	11.3	61.2	27.6	40,037	855,358
GREAT LAKES	1,542,444	7,889,191	9,732,719	19,164,354	8.0	41.2	50.8	1,457,611	20,621,965
ILLINOIS	539,012	2,262,447	2,750,082	5,551,541	9.7	40.8	49.5	574,175	6,125,716
INDIANA	121,434	1,322,443	771,883	2,215,760	5.5	59.7	34.8	40,992	2,256,752
MICHIGAN	391,565	1,750,000	2,744,366	4,885,931	8.0	35.8	56.2	242,000	5,127,931
OHIO	346,900	1,710,700	2,159,600	4,217,200	8.2	40.6	51.2	335,900	4,553,100
WISCONSIN	143,533	843,581	1,306,788	2,293,902	6.3	36.8	57.0	264,544	2,558,446
PLAINS	617,230	3,384,758	3,815,654	7,817,642	7.9	43.3	48.8	361,933	8,179,575
IOWA	105,863	619,291	711,953	1,437,107	7.4	43.1	49.5	19,517	1,456,624
KANSAS	75,100	503,500	526,500	1,105,100	6.8	45.6	47.6	45,000	1,150,100
MINNESOTA	143,300	1,234,300	877,600	2,255,200	6.4	54.7	38.9	152,400	2,407,600
MISSOURI	185,778	678,089	972,101	1,835,968	10.1	36.9	52.9	57,110	1,893,078
NEBRASKA	51,089	157,778	437,500	646,367	7.9	24.4	67.7	60,406	706,773
NORTH DAKOTA	20,100	115,000	118,000	253,100	7.9	45.4	46.6	21,000	274,100
SOUTH DAKOTA	36,000	76,800	172,000	284,800	12.6	27.0	60.4	6,500	291,300
SOUTHWEST	1,061,838	5,019,497	3,600,695	9,681,990	11.0	51.8	37.2	616,635	10,298,625
ARIZONA	146,449	495,286	577,128	1,218,863	12.0	40.6	47.3	77,761	1,296,624
NEW MEXICO	89,989	452,795	126,427	669,211	13.4	67.7	18.9	18,282	687,493
OKLAHOMA	163,000	825,000	407,000	1,392,000	11.5	59.3	29.2	85,000	1,477,000
TEXAS	665,400	3,246,376	2,490,140	6,401,916	10.4	50.7	38.9	435,592	6,837,508
ROCKY MOUNTAINS	232,197	1,501,852	1,525,079	3,259,128	7.1	46.1	46.8	214,701	3,473,829
COLORADO	90,074	605,838	782,366	1,478,278	6.1	41.0	52.9	55,000	1,533,278
IDAHO	32,250	235,100	115,000	382,350	8.4	61.5	30.1	25,500	407,850
MONTANA	37,000	198,000	175,000	410,000	9.0	48.3	42.7	20,000	430,000
UTAH	54,423	383,738	273,457	711,618	7.6	53.9	38.4	86,735	798,353
WYOMING	18,450	79,176	179,256	276,882	6.7	28.6	64.7	27,466	304,348
FAR WEST	1,405,692	9,838,267	2,611,664	13,855,623	10.1	71.0	18.8	424,600	14,280,223
CALIFORNIA	1,091,700	7,797,625	1,455,500	10,344,825	10.6	75.4	14.1	275,000	10,619,825
NEVADA	23,240	153,620	120,190	297,050	7.8	51.7	40.5	19,600	316,650
OREGON	130,000	480,000	725,000	1,335,000	9.7	36.0	54.3	90,000	1,425,000
WASHINGTON	160,752	1,407,022	310,974	1,878,748	8.6	74.9	16.6	40,000	1,918,748
ALASKA	61,081	325,391	80,739	467,171	13.1	69.6	17.3	19,600	486,771
HAWAII	54,567	378,411	11,491	444,469	12.3	85.1	2.6	0	444,469

**See page 24.

†See notes, page 28.

From Estimates Of School Statistics, 1980-81.
Washington, D.C. National Education Association 1981

TABLE 11.--ESTIMATED EXPENDITURES FOR PUBLIC SCHOOLS, 1980-81 **

REGION AND STATE	TOTAL CURRENT EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY DAY SCHOOLS: AMOUNT (IN THOUSANDS)	TOTAL CURRENT EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY DAY SCHOOLS: PER PUPIL IN ADA	TOTAL CURRENT EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY DAY SCHOOLS: PER PUPIL IN ADM	CURRENT EXPENDITURES FOR OTHER PROGRAMS (IN THOUSANDS)	CAPITAL OUTLAY (IN THOUSANDS)	INTEREST ON SCHOOL DEBT (IN THOUSANDS)	TOTAL CURRENT EXPENDITURES, CAPITAL OUTLAY, AND INTEREST (IN THOUSANDS) COLS. 2,5,6,AND 7
1	2	3	4	5	6	7	8
50 STATES AND D.C.	$91,960,346	$2,445	$2,288	$1,591,610	$6,312,321	$2,152,929	$102,017,286
NEW ENGLAND	5,648,884	2,832	2,575	138,134	366,570	98,448	6,270,036
CONNECTICUT	1,481,500	2,934	2,715	13,338	25,500	23,600	1,543,600
MAINE	446,575	2,138	2,025	10,500	20,000	10,000	487,075
MASSACHUSETTS	2,858,375	3,186	2,780	101,773	289,572	43,741	3,293,461
NEW HAMPSHIRE	313,662	1,882	1,857	1,482	23,272	10,500	348,916
RHODE ISLAND	389,600	2,919	2,736	3,700	3,600	6,600	403,500
VERMONT	179,172	1,969	1,870	5,679	4,626	4,007	193,484
MIDEAST	19,730,004	3,149	2,857	446,231	646,954	568,259	21,391,448
DELAWARE	282,300	3,142	2,889	6,400	4,630	9,000	302,300
MARYLAND	1,933,968	2,846	2,598	24,987	72,814	27,259	2,081,048
NEW JERSEY	3,802,600	3,325	3,019	68,000	61,400	84,400	3,996,400
NEW YORK	8,742,000	3,467	3,120	175,000	330,000	225,000	9,492,000
PENNSYLVANIA	4,821,700	2,659	2,436	160,400	170,000	222,600	5,175,500
DIST. OF COLUMBIA	325,416	3,785	3,291	11,444	7,360	0	344,200
SOUTHEAST	17,579,950	1,949	NA	336,662	1,275,825	320,299	19,512,136
ALABAMA	1,118,900	1,593	1,516	3,700	92,000	11,000	1,225,600
ARKANSAS	673,371	1,609	1,525	1,900	93,406	17,833	786,510
FLORIDA	3,200,000	2,237	2,170	0	260,000	50,000	3,510,000
GEORGIA	1,870,200	1,901	1,787	19,200	66,500	31,100	1,967,000
KENTUCKY	1,223,380	1,998	1,854	6,672	65,444	33,000	1,308,496
LOUISIANA	1,400,000	1,972	1,811	4,500	92,300	28,300	1,525,100
MISSISSIPPI	795,271	1,771	1,688	6,300	72,741	6,465	880,477
NORTH CAROLINA	2,139,948	2,030	1,905	170,300	115,000	0	2,424,948
SOUTH CAROLINA	1,014,319	1,773	1,667	12,341	127,663	31,680	1,184,003
TENNESSEE	1,450,130	1,825	1,719	50,573	59,310	48,275	1,624,288
VIRGINIA	1,971,352	2,115	1,971	37,724	197,528	54,520	2,261,124
WEST VIRGINIA	715,079	2,026	NA	15,252	73,133	8,126	812,590
GREAT LAKES	17,809,816	2,550	NA	254,541	933,841	478,612	19,476,810
ILLINOIS	4,821,417	2,803	2,586	42,592	496,396	149,996	5,410,401
INDIANA	1,976,092	2,031	1,901	21,601	116,510	61,993	2,176,196
MICHIGAN	5,091,967	2,958	NA	76,103	215,000	156,000	5,539,070
OHIO	3,867,480	2,143	1,985	66,030	93,100	69,300	4,095,800
WISCONSIN	2,052,940	2,686	2,485	48,245	112,835	41,323	2,255,343
PLAINS	6,870,928	2,437	NA	141,202	514,150	132,761	7,659,040
IOWA	1,289,543	2,593	2,457	0	137,925	17,635	1,415,103
KANSAS	974,200	2,693	2,531	45,400	78,500	18,100	1,116,200
MINNESOTA	1,935,600	2,745	2,581	54,300	132,600	46,600	2,169,100
MISSOURI	1,595,683	2,101	NA	22,400	90,030	30,000	1,738,083
NEBRASKA	621,502	2,353	2,248	7,202	55,725	14,233	698,662
NORTH DAKOTA	215,000	1,934	1,915	9,000	20,500	3,900	248,400
SOUTH DAKOTA	239,400	1,995	1,884	2,900	28,900	2,300	273,500
SOUTHWEST	7,665,284	1,957	1,839	103,197	1,232,660	261,403	9,262,544
ARIZONA	1,170,672	2,444	2,323	0	62,389	34,283	1,267,344
NEW MEXICO	554,974	2,153	2,045	61,377	121,970	7,122	745,443
OKLAHOMA	1,200,000	2,202	2,091	17,000	130,000	12,500	1,359,500
TEXAS	4,739,638	1,798	1,682	24,820	918,301	207,498	9,890,257
ROCKY MOUNTAINS	2,686,476	2,144	NA	17,794	388,846	76,997	3,170,113
COLORADO	1,193,840	2,348	2,261	2,357	74,376	36,100	1,306,373
IDAHO	337,900	1,780	NA	165	46,000	8,100	392,165
MONTANA	358,850	2,550	2,392	9,150	37,000	4,000	404,000
UTAH	572,860	1,777	1,681	10,816	196,430	22,744	802,860
WYOMING	223,026	2,437	2,290	606	35,032	4,051	264,715
FAR WEST	13,142,390	2,570	2,499	136,300	889,225	190,309	14,369,224
CALIFORNIA	9,708,390	2,513	2,477	75,300	396,900	105,000	10,285,290
NEVADA	281,520	2,059	1,922	13,300	52,150	13,560	360,530
OREGON	1,245,000	2,981	2,767	8,000	128,219	25,000	1,406,219
WASHINGTON	1,927,480	2,737	2,566	40,000	302,956	46,749	2,317,185
ALASKA	404,679	5,220	4,731	6,432	43,850	23,834	477,995
HAWAII	381,935	2,575	2,350	12,917	31,830	2,000	427,852

**See page 34.
†See notes, page 35.

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No. 82-639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD OF EDUCATION,
CITY SCHOOL DISTRICT, ROCHESTER, NEW YORK, ET AL.,
Appellants,

v.

EWALD B. NYQUIST,
COMMISSIONER OF EDUCATION, ET AL.,
Appellees.

On Appeal from the Court of Appeals of New York

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In its gross overreading of *Rodriguez*, defendants' motion to dismiss or affirm entirely fails to answer the severe schooling disadvantages that New York's arbitrarily reduced aid for big city schooling imposes upon the vast majority of the state's poor and minority children. Defendants would tar plaintiffs and city plaintiffs with the same *Rodriguez* brush, but their situations are materially different. *Rodriguez* declined to require a state fully to offset a school district's poverty of taxable resources—rationality was found in the state's interest in local control of education. *Rodriguez* did not at all deal with a statute under which the state itself gives reduced and below average aid to distressed city schools and children because of its failure to consider debilitating urban factors—higher inexorable costs for non-education

services, higher costs of teachers and other resources, higher absenteeism rates that mean greater outlays, and immense concentrations of educationally disadvantaged and handicapped children. It was one thing for the state in *Rodriguez* to fail to redress a locality's shortage of school resources; it is quite another for the state itself to impoverish those resources by short-changing city districts on their share of education aid. No interest in local control or any other cogent interest has here been stated to excuse New York's disfavored treatment of the school systems that must educate the great majority of the state's poor and racial minority children. Such systematic impoverishment of education for the poor and needy is not what *Rodriguez* anywhere approved, but rather what it expressly reserved for a case presenting that issue; this is that case.

Evidencing defendants' own doubts about the applicability here of *Rodriguez*, they press avoidance arguments —challenging city plaintiffs' standing and questioning whether the existing discriminatory formula can be remedied—arguments which require but brief response. Alleging that the city plaintiffs "are school districts, not individuals with Fourteenth Amendment rights" (Mot. 19), defendants are nevertheless forced to acknowledge that the city plaintiffs include city school children, but they complain that "not one iota of evidence about any of them was introduced" (Mot. 23). To the contrary, dozens of urban witnesses, including teachers, principals, social workers and parents, presented voluminous evidence demonstrating the injurious deprivations caused the city plaintiff children by the state's inferior aid to city schools. An eight month trial focused precisely on the schooling deprivations to which plaintiffs and other school children are subjected, and there is simply no basis for defendants' claim that school children are not real parties seeking relief in this case.

Defendants alternatively argue that children in New York's big cities suffer no denial of equal protection be-

cause their schools meet the Regents' minimum requirements (Mot. 6, 17). This argument hardly answers the affirmed findings that, due to restricted school resources, masses of disadvantaged city children underachieve and thousands lack meaningful opportunity to attain even minimal educational skills. As the Appellate Division concluded, under the state school finance scheme, in the cities "large numbers of children emerge from the school system lacking even the minimal tools necessary to function in society" (A68-69). Particularly in view of this Court's ruling in *Plyler* v. *Doe*, —— U.S. ——, 102 S.Ct. 2382 (1982), the Regents' failure to set standards high enough to permit remediation of severe learning failures in the city schools cannot excuse the unequal support by the state to the distressed city school systems most in need of aid but receiving only reduced and below average state payments.[1]

Defendants also misrepresent the city plaintiffs' complaint that the state yields cities reduced aid for disadvantaged children. We do not merely assert (Mot. 14) "that per-pupil aids for handicapped and disadvantaged students are not sufficient to compensate the cities for their concentrations of those students." Rather, the city plaintiffs complain of the arbitrary *inferiority* in state school aid to city districts for such pupils, who are massed in the city schools (see J.S. 12-13). City school populations are the most difficult and expensive to educate, and yet the state provides them fewer resources than most of its other children.[2]

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[1] Defendants allege (without citation) that the big cities do not "direct proportionally more of their resources to their poor, disadvantaged, Black or Hispanic students" (Mot. 24). However, the New York courts found to the contrary that "the cities concentrate resources on pupils with special needs" (A51).

[2] Defendants compound their misrepresentation by grossly overstating the amount of state aid for educating these and other special need children. They allege, for example, that an additional

Finally, defendants complain that plaintiffs have not defined to the courts a specific remedy for the statute's inferior aid to city schools and pupils (Mot. 24-25). But it is the legislature's prerogative to propose remedies in the first instance if courts find an existing law unequal. In any event, upon the trial court's holding in 1978 that the current system is unconstitutional, the Governor appointed a Task Force of public officials, business and labor leaders, educators and other citizens, which issued a three volume report based on extensive research and statewide analysis (App. B to the Brief for City Plaintiffs in the New York Court of Appeals). The report presented a number of constitutionally acceptable and fiscally sound corrections of the statute to provide equity for the children in the city schools. But the legislature has felt free to disregard the equalization proposals of the Task Force in the absence of a final judicial decree requiring reform.

$471.25 is "guaranteed" for each disadvantaged pupil, which "reimburses for concentrations of disadvantaged students" (Mot. 9), and further that school districts are "reimbursed for their actual expenses over the operating aid ceiling" in educating handicapped children (Mot. 9-10). There is no such reimbursement, and what the state actually provides for educating these children is only a formula fraction of a "guaranteed" amount (e.g., $199 per disadvantaged elementary school child in Rochester, A189), with the local school district paying the remainder (see the findings of fact, A189-94, 216-19).

Defendants also allege that students in New York's poorest district have more money spent on their education than the average pupil in virtually any other state (Mot. 5). Maldistribution of school funds cannot in any event be justified by a high overall level of spending, but defendants' statements about Salmon River in fact contradict the evidence they cite. The only per pupil expenditure figure for Salmon River that appears in the record (JA 6771) is lower than the average per pupil expenditure in 30 other states, according to defendants' own appendix.

Beyond defendants' unpersuasive avoidance arguments, the faulty central premise of their motion is that it leaves no meaningful assurance of equal protection applicable to a state's public education statute, even when it provides reduced support and inferior education to the great majority of the state's poor and minority children who are the most educationally needy. Defendants' plea for a judicial abstention rule so broad as to nullify equal protection in public education even for those who most require equal treatment fails for two conclusive reasons. *First*, public education deserves more than minimal equal protection status, for throughout our national history education has been uniquely recognized as the single most important function of the state, fundamental to the very operation of our democratic system of government and the best hope of the poor for equal opportunity in society. See *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972); *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). *Second*, even if education were denied a heightened standard of judicial review, there is no rational basis anywhere suggested for the disfavored treatment that the New York aid law accords to most of the state's poorest and most educationally disadvantaged children. Treating as wealthy and less deserving of aid the educationally impoverished city school districts is irrationality above and beyond anything contemplated in *Rodriguez*.

1. In recognition of the fundamental importance of schooling to the operation of our system of popular government, which depends on an informed and literate electorate, the right to public education was incorporated in the earliest state charters and—unlike other public functions—today is uniquely guaranteed by virtually every state constitution. As early as 1797, George Washington called attention to the crucial importance of "institutions for the general diffusion of knowledge," counseling that

"in proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened." J. C. Fitzpatrick, ed., 35 *The Writings of George Washington* 230 (1940). Jefferson, too, stressed the importance of public education to a democratic society, warning that "if a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." P.L. Ford, ed., 10 *The Writings of Thomas Jefferson* 4 (1899). Similarly, the earliest state constitutions bespoke the fundamental importance of public education. Thus in 1780 Massachusetts' constitution recognized public education as a legislative duty "necessary for the preservation of [the people's] rights and liberties" (Ch. V, 1780). Throughout the 19th century state after state made express constitutional provision for public schooling, frequently articulating its necessity for our democratic political system.[3] New York, in requiring education for "all the children of this State" (Const. 1895, Art. IX), similarly underscored the consensus that "the first great duty of the State is to protect and foster its educational interests." 1894 N.Y. Convention Doc. No. 62, at 2-3.

The guarantee of universal public education has served an additional vital public purpose in assuring a more equal opportunity for the poor to advance in society. As early as 1790, Pennsylvania's constitution required that public schools be established "in such manner that the poor may be taught gratis" (Art. VII). The Indiana Constitution of 1816 required "a general system of education . . . wherein tuition shall be gratis, and equally open to all" (Art. IX). The egalitarian purpose of public education found similar expression in the 1812 Report of the New York Commission on Common Schools, which

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[3] See, e.g., N.H. Const., Sec. LXXXIII (1792); Ms. Const., Art. VI (1817); Me. Const., Art. VIII (1819); Tn. Const., Art. XI (1834); N.C. Const., Art. IX (1876).

led to the establishment of "a system of common schools . . . to bring instruction within the reach and means of the humblest citizen." C. Z. Lincoln, 2 *Messages from the Governors* 724 (1906). The 19th century common school movement led by Horace Mann promoted universal free education as the "great equalizer of the condition of men," which "prevents being poor." L.A. Cremin, ed., *The Republic and the School* 85-87 (1957). And that egalitarian duty of the state to accord "the same opportunities for education . . . to all children alike" was a central principle reflected in early 20th century school finance reforms. *Public Papers of Governor Alfred E. Smith* 70 (1923).[4]

In sum, as the underpinning of effective democratic self-government and the safeguard against a permanent poverty class, public education has long been made the unique duty owed by the state to all its children. Surely more than minimal equal protection scrutiny is due a right which has been so universally recognized as the signal duty of the state to foster and provide. If there is any public system to whose inequalities meaningful constitutional review should apply, particularly when it disadvantages the poor, it is certainly the fundamental system which has been seen from the beginning as the promise to the poor of a more equal chance in society. The application of the most minimal review standard by the court below to a right of such paramount public importance calls for this Court's plenary consideration.

2. Even if no heightened review were to be accorded to the unequal school support statute before the Court, defendants are in error in urging that, even without a manifest justifying basis, *Rodriguez* here validates in-

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[4] A comprehensive historical study, covering nearly two centuries and documenting the primacy of these egalitarian themes, was filed in the Court of Appeals as Appendix D to the Brief for City Plaintiffs.

ferior state support to hard-pressed cities unable to provide schooling to meet the acute needs of their many educationally disadvantaged children. Thus, the trial court found that under the state aid law's "less favorable treatment of unequals" (A308), in the cities "Many disadvantaged pupils received not compensatory education and enrichment, but lesser resources than pupils elsewhere because class size and pupil-staff ratios in the cities are among the largest in the State, while facilities and support services are among the most constricted" (A202); the result found by the court is that "thousands of students in the big city school districts fail to achieve even basic minimal skills" (A226-30). The Appellate Division similarly concluded that as concerns the cities the statute "fails to give fair and adequate consideration to their special and severe educational overburdens" (A94) so that "unconscionable numbers of children fail to acquire basic educational skills" (A50). And even the Court of Appeals recognized that "the four major cities represented by the intervenors . . . are forced to provide instructional services and facilities of a lesser quantity, variety, and quality," and conceded the existence of "great and disabling and handicapping disparities in educational opportunities across our State, centered particularly in our metropolitan areas . . ." (A12, 23).

When such severe schooling deprivations flow from the state's mismeasurement of both urban school funding capacities and needs (see J.S. 7-13), a cogent rational basis is plainly required to justify so injurious a result. In striking down a statute far less consequential than a law that malapportions funds for the education of children, this Court has recently required in its *Zobel* ruling a cogent rational basis for differing state financial payments. Surely no less is required to justify unequal state support here than was required in *Zobel* to justify disparate financial payments to the state's citizens. Yet the lower courts' detailed findings that there is no rational

basis for the statute's multiple mismeasurements of city aid entitlement remain wholly unanswered in the ruling below, which offers no tangible justification for the state's inferior treatment of the vast majority of its poor and minority children.[5]

In sum, the absence of a rational basis clearly distinguishes this case from *Rodriguez*, which defendants mistakenly read as authorizing a state's inferior school support to its most educationally needy children. Dissenting Judge Fuchsberg emphasized below that, unlike the present case, in *Rodriguez* "there was no claim that the statute malapportioned State school aid by mismeasuring the funding capacities and needs of city districts" (A33). Actually, the present case presents the question expressly reserved in *Rodriguez*, concerning a school system that works to "the peculiar disadvantage" of the poor (411 U.S. 1, 26). The unjustified reduction of support by

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[5] Like the ruling below, defendants' motion remains mute concerning three of the four major mismeasurements of the cities' school aid entitlement under the existing statute—disregard of their higher school costs, the penalty for costly student absenteeism by a daily attendance measure of aid, and the inferior support for their disadvantaged and handicapped pupils. And as concerns municipal overburden, defendants are in error in suggesting (Mot. 15-16, 24) that city plaintiffs ask the courts to determine whether a city's budget is "fairly divided" among different spending categories or whether school spending is given the "lowest priority". The central flaw found by the lower courts is that the New York legislature has decided to provide greater "equalizing" aid for districts with lesser school funding capacity but has failed to measure the cities' capacity in a realistic way. It bears repetition that the New York courts found that the population and physical characteristics of the cities prevent them from drawing on their tax base for school funding to the same extent as other jurisdictions. Yet instead of taking account of this reality New York's "equalizing" aid statute exacerbates the cities' disadvantage, by defining a district's local school financing capacity solely in terms of a property and income tax base per child most of which is unavailable for education funding (see our J.S. 8-10).

New York to its city school systems, injuring those of the state's children who most deserve rigorous equality and constitutional protection, presents a vital issue that calls for this Court's plenary review.

Respectfully submitted,

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